DOCUMENT RESUME

ED 278 096 EA 019 082

AUTHOR Gittins, Naomi E., Ed.; And Others
TITLE School Law in Review--1986. Proceedings of the NSBA Council of School Attorneys Annual School Law Seminar (Las Vegas, Nevada, April 4-5, 1986). Volume 2.
INSTITUTION National School Boards Association, Alexandria, VA. Council of School Attorneys.
REPORT NO ISBN-0-88364-115-1
PUB DATE 86
NOTE 136p.
AVAILABLE FROM Publication Sales, National School Boards Association, 1680 Duke Street, Alexandria, VA 22314 ($30.00 plus $1.50 postage and handling).
PUB TYPE Reports - Descriptive (141) -- Collected Works - Conference Proceedings (021)

EDRS PRICE MF01/PC06 Plus Postage.
DESCRIPTORS *Child Abuse; Courts; *Disabilities; Elementary Secondary Education; *Freedom of Speech; Legal Problems; Legal Responsibility; Parochial Schools; Public Schools; *Religion; *School Law; *Search and Seizure; Student Rights; Teacher Rights; Torts
IDENTIFIERS Supreme Court

ABSTRACT

This volume of seminar presentations covers a broad range of legal issues affecting public schools. The first chapter summarizes employee free speech developments since "Connick v. Myers" (1983), a United States Supreme Court decision upholding a district attorney's right to dismiss a transferred assistant for circulating a controversial questionnaire to coworkers. "Connick" and "Pickering" (an earlier case balancing employee and employer interests) are analyzed for their effects on recent court actions involving employee criticism of employer policy, symbolic speech, political affiliations, sexual preference, and other issues. The second chapter discusses recent decisions concerning religion, such as school prayer, parochial school aid, equal access, home schooling, compulsory attendance, creationism, and religious objections to curriculum. The third chapter examines the application of the Fair Labor Standards Act to school boards, while the fourth chapter treats the legal aspects of child abuse, especially school personnel's legal obligation to detect and report it. The fifth chapter examines a 1985 Supreme Court decision allowing school officials to search a student if "reasonable suspicion" exists. The sixth chapter summarizes recent handicapped education law, while the final chapter updates Supreme Court actions affecting schools. Numerous case citations are given in footnotes and a subject index is provided. (MLH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED278096

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

J. Floyd

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

EA 019 082

About NSBA . . .

The National School Boards Association is a not-for-profit organization whose primary mission is the advancement of education through the unique American tradition of local citizen control of, and accountability for, the nation's public schools. In this way, education policy is decided by local school board members who are directly accountable to the community. NSBA promotes the quality of education through services to state school boards associations and local school districts. It represents school boards' interests in Washington, D.C., before Congress, federal education agencies, and other national regulatory bodies.

Active Members of NSBA include the 49 state school boards associations and the boards of education of Hawaii, the District of Columbia, and the U.S. Virgin Islands. In addition, approximately 1,900 school systems are members of NSBA's Direct Affiliate program. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

NSBA is located in the metropolitan Washington, D.C. area at 1680 Duke Street, Alexandria, Virginia 22314. For more information about NSBA, write or call (collect) 703/838-NSBA.

About the NSBA Council of School Attorneys . . .

Under the aegis of the National School Boards Association, the Council of School Attorneys was organized in 1969 to provide a national forum on the practical legal problems faced by local public school districts and the attorneys who serve them. In this way, the Council works to promote closer relationships among school attorneys, client school boards and state associations of local school boards. The Council has more than 1800 members, with representatives from almost every state and the District of Columbia.

Membership in the Council is open to attorneys at law who are licensed to practice before the highest court of any state of the U.S. or before a court of record of the U.S.; and who are (or have been within the immediate past 2 years) attorneys for a local public school district, a state association of local school boards of any public junior or community college. The entire membership of any state council of school attorneys sponsored or recognized by a state association of local boards affiliated with NSBA may secure integrated membership with the Council.

National School Boards Association
Council of School Attorneys

SCHOOL LAW IN REVIEW—1986
VOLUME 2

Naomi E. Gittins
Betty E. Landis
Kenneth M. Perry
EDITORS

Nellie C. Weil
President, NSBA

Thomas A. Shannon
Executive Director, NSBA

August W. Steinhilber
Associate Executive Director, NSBA

Gwendolyn H. Gregory
Deputy General Counsel, NSBA

Martharose Laffey
Assistant Executive Director

Susan R. Butler
Director, Administrative Dept.

George T. Rogister, Jr.
Chairman, Council of School Attorneys

SCHOOL LAW IN REVIEW is a publication of the NSBA Council of School Attorneys, a component of NSBA's Center for State Legislation, School Law and Public Policy. For more information about the NSBA Council of School Attorneys, its publications, programs and membership, call 703/838-NSBA, or write NSBA, 1680 Duke Street, Alexandria, VA 22314.

Copyright 1986, National School Boards Association. All Rights Reserved.

ISBN: 0–88364–115–1

TABLE OF CONTENTS

FOREWORD v

EMPLOYEE FREE SPEECH: DEVELOPMENTS IN THE LAW SINCE CONNICK v. MYERS
by Susan B. Tabler
Ice, Miller, Donadio & Ryan
Indianapolis, Indiana 1

RELIGION IN THE SCHOOLS: THE YEAR IN REVIEW
by Jeffery A. Davis
Reynolds, Allen & Cook
Houston, Texas 21

APPLICATION OF THE FAIR LABOR STANDARDS ACT TO SCHOOL BOARDS
by Ronald J. James
Squire, Sanders & Dempsey
Cleveland, Ohio 43

LEGAL ASPECTS OF CHILD ABUSE AND PUBLIC SCHOOLS
by W. Richard Fossey
Bankston & McCollum, P.C.
Anchorage, Alaska 55

NEW JERSEY v. T.L.O.: THE UNANSWERED QUESTIONS
by Richard A. Schwartz
Tharrington, Smith & Hargrove
Raleigh, North Carolina 63

HANDICAPPED EDUCATION: RECENT DEVELOPMENTS IN THE LAW
by Richard D. Kirk
Morris, James, Hitchens & Williams
Wilmington, Delaware 85

SUPREME COURT UPDATE
by Gwendolyn H. Gregory
Deputy General Counsel, NSBA
Alexandria, Virginia 105

INDEX 127

FOREWORD

This volume represents a continuation of the Council of School Attorneys' past practice of publishing the proceedings of its Annual School Law Seminar. The 1986 meeting took place in Las Vegas, Nevada on April 4-5, 1986. At the seminar school law experts made presentations covering a broad range of issues and topics relevant to the legal representation of this nation's public school boards. These presentations have been compiled and edited and now appear in this publication for use by attorneys and others who must keep abreast of the current developments in the law affecting schools.

I extend my thanks to those who contributed their time, effort, and knowledge to this publication. I also wish to recognize the work of Naomi Gittins, Kenneth Perry and Betty Landis who carefully prepared these articles for final publication.

George T. Rogister
Chairman
Council of School Attorneys
July, 1986

Employee Free Speech: Developments in the Law Since Connick v. Myers

by: Susan B. Tabler

INTRODUCTION

The First Amendment protects, among other rights, the freedom of speech. Justice Cardozo spoke of free speech as "the matrix, the indispensable condition" of the other freedoms.[1] Free speech assures a continual means of communication between the sovereign people and their elected and appointed representatives; it enables the people to enlighten themselves so as to become competent participants in governing. The First Amendment serves as a safety valve to forestall violence; as a necessity for the pursuit of truth; and as an underpinning of human dignity and fulfillment. Because of its significance, some have opined that the First Amendment occupies a "preferred position" in the hierarchy of constitutional values.[2]

The Supreme Court has held that the First Amendment's guarantee of free speech is not an absolute guarantee.[3] The right of free speech does not protect one who knowingly or recklessly makes false statements,[4] makes false advertising claims,[5] publishes obscenity,[6] or shouts fire in a crowded theater.[7] In all of these areas, the Supreme Court has attempted to balance the rights of the speaker and the intended recipient to the point that "we can have both full liberty of expression and an orderly life."[8] Although each instance of restricting free speech is neces-

---

[1] Palko v. Connecticut, 302 U.S. 319, 327 (1937), *overruled on other grounds*, 395 U.S. 793.

[2] Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 115 (1943).

[3] Breard v. Alexandria, 341 U.S. 622, 642 (1951).

[4] New York Times Co. v. Sullivan, 376 U.S. 254, 279–280 (1964).

[5] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

[6] Miller v. California, 413 U.S. 15, 23 (1973).

[7] Schenck v. United States, 249 U.S. 47, 52 (1919).

[8] Breard v. Alexandria, 341 U.S. 622, 642 (1951). The Supreme Court stated that free speech does not mean the absolute right to talk when and how one chooses, but must take into account the rights of others.

sarily a question of degree,[9] the overriding objective has been to prevent the suppression of speech that should be heard.[10]

The parameters of free speech for public employees have been debated in the courts for years. Public employees are caught between two countervailing forces: (1) as employees, they have an obligation to support the interests of their employer in performing public services, while (2) as citizens, they have a right to speak out on issues of public concern. Often, the interests of the state require that public employees do not exercise their First Amendment rights to the same extent that private citizens may.[11]

In order to understand the current state of the law concerning public employee free-speech rights, it is necessary to review the roots and evolution of the doctrine. The first major pronouncement on the subject occurred less than twenty years ago: in 1968, in *Pickering v. Board of Education*,[12] the Supreme Court set the groundwork by requiring a balancing between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. Thereafter, the Supreme Court reaffirmed its position in *Connick v. Myers*,[13] ruling that the right of free speech is infringed upon only when a public employee is prevented from speaking out on matters of public concern. In the wake of *Connick*, public employees continue to include First Amendment claims in the ever-expanding arsenal of weapons used to barrage public employers. The following article examines significant cases in the area of public-employee free speech since *Connick*.

THE STATE OF THE LAW PRIOR TO CONNICK V. MYERS

Within the last few decades, the courts have rendered several decisions in an attempt to clarify the ambiguous state of public employees' free speech rights. The first movement for public employee free speech rights was triggered by the Supreme Court decision in *New York Times Co. v. Sullivan*.[14] In this case, the *New York Times* printed an advertisement which made false statements about the Montgomery Police Department. Sullivan, the Commissioner of Public Affairs and supervisor of the police department, filed suit against the *Times* for libel. The *Times* did not dispute the errors. The Supreme Court held that the First Amendment prohibited a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proved that the statement was made with actual malice. This rule was necessary, according to the Court, in order to carry out "a profound national commitment to the principle that debate

---

[9] Schenck v. United States, 249 U.S. at 52.

[10] New York Times Co. v. Sullivan, 376 U.S. at 292. The Supreme Court stated that the possiblity that good faith criticism of the government will be suppressed is inconsistent with the purpose of the First Amendment. For an expanded discussion on this topic *see also* Allred, *Connick v. Myers: Narrowing the Free Speech Right of Public Employees*, 33 Catholic University Law Review 429–456 (Winter, 1984).

[11] For an expanded discussion on this topic *see* Rubin, *When the Governed Criticize their Governors: Parameters of Public Employees' Free Speech Rights*, 10 Employee Relations Law Journal 106–119 (Summer, 1984).

[12] 391 U.S. 563 (1968).

[13] 461 U.S. 138 (1983).

[14] 376 U.S. 254 (1964).

on public issues should be uninhibited, robust, and wide-open."[15] While the *Sullivan* decision did not involve the free speech rights of public employees, the case established the principle that criticism of public officials and government is protected under the First Amendment. Thus, public employees began to question whether they too had the right to criticize public officials, including their supervisors and employers.[16]

It was not until the Supreme Court decision in *Pickering v. Board of Education*[17] that any significant guidance was provided in defining the scope of a public employee's free speech rights. In *Pickering*, a public high school teacher was dismissed for submitting to a local newspaper a factually inaccurate letter that criticized the school board and the superintendent for their past allocation of bond revenues and for attempting to prevent teachers from opposing the proposed bond issuance. The Court held that Pickering's "speech" related to a matter of public concern upon which free and open debate was vital to informed decision-making by the electorate.[18] The *Pickering* Court also formulated the principal that the employee's interest in commenting upon a matter of public concern must be balanced against the state's interest in promoting the efficiency of the public service.[19]

In addition, rather than establishing a universal standard against which all assertedly protected statements may be judged, the Court identified certain factors to be considered when striking a balance between employee and employer rights. The first factor to consider is the need for harmony in the office or work place.[20] The Court suggested that a requirement of a close working relationship between the employee and the managers who are subjects of the employee criticism could tip the balance in favor of the employer's right to limit free speech. Secondly, consideration must be given to the detrimental effect of the employee's statement on the employer's business operations.[21] Thus, the greater the potential detrimental effect the statement may have on the employer's ability to function, the greater the need of the employer to control the employee's speech. Thirdly, the Court raised the factor of the nature and complexity of the issue upon which the employee spoke and the relationship of the employee to that issue.[22] Where there is a close nexus between the employee and the issue, the possibility that the employee will make a valuable contribution to the public understanding will tip the scales in favor of protecting his free speech.[23]

Later applications of *Pickering* have explained and expanded the principles established by the Supreme Court. In *Perry v. Sindermann*,[24] the Court made it

---

[15] *Id.* at 270.

[16] *See* Rubin, *When the Governed Criticize their Governors: Parameters of Public Employees' Free Speech Rights*, 10 Employee Relations Law Journal 106–119 (Summer, 1984).

[17] 391 U.S. 563 (1968).

[18] *Id.* at 571–72.

[19] *Id.* at 568.

[20] *Id.* at 570.

[21] *Id.* at 570.

[22] *Id.* at 572.

[23] For further discussion see Allred, *Connick v. Myers: Narrowing the Free Speech Right of Public Employees*, 33 Catholic University Law Review 429–456 (Winter, 1984).

[24] 408 U.S. 593 (1972).

clear that the free speech protection is not limited to permanent (*i.e.*, tenured) employees. In this case, Sindermann, an untenured college professor, spoke at hearings before the Texas state legislature urging a proposal which would elevate all junior colleges in the state to four-year institutions. This change was opposed by the Board of Regents of Odessa State College, where Sindermann was employed. Subsequently, Sindermann's employment contract was not renewed. Sindermann thereafter filed suit claiming that the decision not to rehire him was in retaliation for his public opposition to the policies of his employer. In remanding the case, the Supreme Court noted that criticism by a public employee of his superiors may be constitutionally protected and thus may be an impermissible basis for firing the employee.[25]

In *Mount Healthy City School District Board of Education v. Doyle*,[26] the Supreme Court clarified the burden of proof an employer must meet in terminating an employee under the *Pickering* test. In *Mount Healthy*, an untenured school teacher's employment was terminated after he revealed to a local disc jockey the substance of a school principal's internal memorandum concerning dress codes for teachers. The teacher asserted that the memorandum was a breach of an agreement that the dress code issue was to be settled by joint teacher-administrator action. The school board fired the teacher at the end of the year, citing the adverse publicity he had caused as a principal basis for its action.[27]

The Supreme Court found that the teacher's call to the radio station constituted free speech on a matter of public concern.[28] In reaching this conclusion, the Court held that the burden was initially on the employee to show that he had engaged in constitutionally protected conduct, and that this conduct had been a motivating factor in the decision to fire him. Once this *prima facie* showing was made, the burden shifted to the employer to show, by a preponderance of the evidence, that the termination would have occurred irrespective of the protected activity.[29]

In *Givhan v. Western Line Consolidated School District*,[30] the Supreme Court extended the *Pickering* test to protected speech in a private setting. Givhan, a school teacher, met privately with her employer to discuss certain school board policies that she felt were racially discriminatory.[31] Subsequent to her conversation, she was fired. Givhan claimed that the firing was in retaliation for exercising her free speech rights. In determining the proper balance between employee free speech and the efficiency of public service, the Court considered the time, place, and manner in which the message was delivered.[32] The Court held that an employee did not forfeit the right of free speech by private expression upon matters of public concern.[33]

---

[25] 408 U.S. at 595, 598. The Court cited *Pickering* as the basis for its statement.

[26] 429 U.S. 274 (1977).

[27] *Id.* at 283.

[28] *Id.* at 284.

[29] *Id.* at 285, 287.

[30] 439 U.S. 410 (1979).

[31] *Id.* at 412–413.

[32] *Id.* at 415.

[33] *Id.* at 415.

CONNICK V. MYERS

In 1983, in the decision of *Connick v. Myers*,[34] the Supreme Court explained in further detail the limitations on First Amendment protection afforded to public employees. In *Connick*, Myers was an Assistant District Attorney who had been informed that she would be transferred to a different division within the district attorney's office. She strongly opposed the transfer and prepared a questionnaire soliciting the views of her co-workers on a number of issues including officer morale, the need for a grievance committee, and management pressure to work on political campaigns. Connick, Myers' supervisor and the District Attorney, viewed the questionnaire as an act of insubordination and notified Myers on the day she circulated the questionnaire that she was terminated.[35] Myers filed a lawsuit contending that the questionnaire was protected speech.

The Supreme Court held that the speech in this case did not involve a matter of public concern but generally involved matters of purely personal interest. Of the fourteen questions on Myers' survey, the Supreme Court noted that only one question, concerning pressure to work for political candidates, touched directly upon matters of public concern.[36] Therefore, the Court held "that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[37] Resolving the balance in favor of the state, the majority of the Court held that the limited First Amendment interest attaching to the one question did not require Myers' supervisor to tolerate disruptive conduct.[38]

Whereas previous cases had focused upon the factors to be used in striking the proper balance between the employee's right to speak and the employer's right to efficient public service, the *Connick* Court focused upon whether application of a balancing test was necessary at all by first emphasizing the requirement that the issue involves a "matter of public concern." The import of *Connick* is that, as a threshold matter, an employee must surmount the hurdle of establishing that the speech is protected (*i.e.*, involves a matter of public concern) before the court can move on to apply the *Pickering* balancing test.

DEVELOPMENTS IN EMPLOYEE FREE SPEECH SINCE CONNICK V. MYERS

Contrary to the expectations of many public employers, *Connick* has not had the effect of abating employee lawsuits based upon the First Amendment. To the contrary, the volume of First Amendment litigation has increased in the wake of

---

[34] 461 U.S. 138 (1983).

[35] *Id.* at 141.

[36] *Id.* at 155 (Appendix A). Questions 1 through 5 asked employees about the office policy of transfers. Questions 6 through 9 asked employees about office morale. Question 10 questioned employees as to their confidence in office personnel. Question 11 questioned employees concerning pressure to work on political campaigns. Questions 12 through 14 questioned employees about grievance committees and office morale.

[37] *Id.* at 147.

[38] *Id.* at 154.

Connick, as the courts struggle to apply the abstract principles to concrete factual situations. The following survey of cases reflects the types of issues raised in recent years.

Employee Criticism of Employer Policy

- **Matters of "Public Concern"**

Numerous decisions in this area turn upon what a court interprets to be a matter of "public concern." In *Alinovi v. Worcester School Committee*,[39] Alinovi, a tenured teacher, had a child enrolled in her classroom who required special instruction. In addition to implementing a special education program for the child, Alinovi attended an evening course on mental health in education. In connection with her course work, Alinovi prepared a term paper setting forth a discussion of this child's problems and behavior patterns, coupled with general criticisms of the school principal's management of the child. When the principal learned of the term paper, he demanded to see it. Under threat of discharge for insubordination, Alinovi submitted the paper to the principal. For some months thereafter, Alinovi worried about retribution by the principal. In an effort to rally parental support on her side, she posted during Parents' Night a bulletin board showing the letters she had received from the administration concerning her reluctance to submit her term paper to the school principal. Several parents raised questions concerning the letters. In the wake of Alinovi's posting of the letters, she was transferred to several different positions within the school system.

Thereafter, Alinovi protested her treatment by the school system as violative of her Fourth Amendment privacy rights and her First Amendment right to post the letters. The court held that Alinovi's posting of the administration's letters on Parents' Night was not speech upon a matter of "public concern" and, therefore, was not protected by the First Amendment. Accordingly, the school committee was not required to justify to the court any employment decision made by the system regarding Alinovi.[40]

In *Johnson v. Lincoln University of Commonwealth System of Higher Education*,[41] a teacher's expression against university procedures was held to concern a matter of "public interest." A faculty member's activities within the university's Chemistry Department, and his letters to an association of colleges regarding a masters degree program and the low academic standards required in relation thereto, were held generally to involve matters of public concern so as to preclude termination of the faculty member based upon such activities and letters. The court determined that neither the internal nature of the forum,[42] nor the tone of communications,[43] controlled whether the speech touched upon a matter of

---

[39] 766 F.2d 660 (1st Cir. 1985).

[40] *Id.* at 671.

[41] 776 F.2d 443 (3rd Cir. 1985).

[42] *See* Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979), where the Court stated that First Amendment freedoms are not lost when a public employee arranges to communicate privately with his employer rather than to spread his views publicly.

[43] *See* Trotman v. Board of Trustees of Lincoln University, 635 F.2d 216 (3rd Cir. 1980), *cert. denied*, 451 U.S. 986 (1981), where the court held that criticisms of an individual's policies and methods were "core" speech and not deprived of First Amendment protection merely because they were strident.

public concern. Citing *Connick*, the court recognized that speech touched upon a matter of public concern when it could "be fairly considered as relating to any matter of political, social or other concern to the community;"[44] and that speech must be evaluated with reference to the content, form, and context of a given statement, as revealed by the whole record.[45] In the *Johnson* case, the court held that, while personal disputes may have generated many of the events in the Chemistry Department, some of the controversy concerned questions of educational standards and academic policy which clearly touched upon matters of public concern.

In *Bowman v. Polaski County Special School District*,[46] criticisms by two teachers concerning acts of corporal punishment given by another teacher to various students were deemed to touch on a matter of "public concern." The two teachers, who were also coaches, observed the head coach using excessive physical force in punishing students; indeed, some of the students received bruises and welts. After informing the head coach of the effects of his paddling, the two teachers discussed the punishment with parents, made public statements about the unwarranted severity of the paddling, and expressed their personal opinions as to how the head coach should be disciplined. As a result of this activity, the head coach was temporarily suspended and the two teachers were involuntarily transferred to a middle school. The teachers filed suit alleging that the transfers violated their rights of free speech and association. The trial court rescinded the involuntary transfers and ordered the parties to make a good faith attempt to resolve the dispute. Ultimately, the two teachers were again transferred. This time, also, the court sided with the employees. Focusing upon the public interest in the subject matter of the speech, its time, place, context, and manner, and the failure of the speech to impede the teachers' abilities to perform their duties, the court concluded that the speech was protected by the First Amendment.

As these cases indicate, the courts have been remarkably realistic in considering the employee's motivation as an aspect of the public/personal interest question. Why an employee speaks out is every bit as important as what he says in a determination of whether the speech is protected. As these recent decisions attest, a court is less likely to find that the message is of "public concern" if it is uttered by a disgruntled employee or one with a personal stake in the issue.

- **The Pickering Balance**

Although an employee may satisfy the initial requirement set forth in *Connick* by addressing matters of public concern, the speech is not protected unless the *Pickering* balance is resolved in favor of the employee's right to speak. In *Patterson v. Masem*,[47] although the employee spoke upon matters of public concern, the court ultimately resolved the balance in favor of the employer's right to limit the speech. Patterson, a black teacher in the Little Rock School District, was assigned to mediate a controversy over a school play. Concern had been expressed by some teachers over possible racially offensive casting and language, as well as harassment of black students who participated in the play.

---

[44] *See Connick*, 461 U.S. at 146.

[45] *Id.* at 146–47.

[46] 723 F2d 640 (8th Cir. 1983).

[47] 774 F2d 251 (8th Cir. 1985).

Under a compromise agreement, some racially derogatory language was expunged, although it was agreed that the play would be performed. Patterson viewed the compromise as inadequate and recommended that the play be cancelled. Thereafter, Patterson applied for a promotion to supervisor of the English and Social Studies Departments. She was denied the promotion because the school board felt she was abrasive, unable to get along with colleagues, and lacking in interpersonal and management skills. Patterson filed suit alleging that her protest against discriminatory racial practices was the reason for denial of her transfer.

The court found that, although Patterson's speech activity concerned a matter of "public interest," it had interfered with the proper performance of her job. The play incident was held to have logically raised questions about Patterson's willingness to follow her supervisor's directives concerning curriculum and about her abilities to supervise teaching of literature and history in light of her propensities toward censorship and bowdlerism.

Another recent decision focused upon the balancing test set forth in *Pickering* in determining that a junior college was justified in firing a faculty member who had led several anti-Vietnam War protest activities that resulted in disruptions on campus. In *Franklin v. Leland Stanford Junior University*,[48] Franklin, an associate professor, gave a speech which called for a strike to shut down some of the university's activities during a time of protest against the Vietnam War. Later that same day, Franklin interfered with a policy order directing the crowd to disperse by inciting those present, including a number of students, to disobey the order. After a hearing held by a seven-member faculty advisory board, Franklin was discharged.

In the ensuing lawsuit, Franklin's major contentions were that his conduct was protected by the First Amendment and that the university regulations authorizing his discharge were unconstitutionally vague. The California Court of Appeals found Franklin's actions to be well outside "constitutional bounds" and not protected by the First Amendment. In reaching that conclusion, the court relied upon *Pickering* and the balancing of interests of the employer and the employee in determining whether Franklin's conduct was protected against disciplinary action. The court also cited *Tinker v. Des Moines School District*[49] for the principle that expressive conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others"[50] is not protected by the constitutional guarantee of freedom of speech. Weaving these concepts together, the *Franklin* court held that the constitutional right of free speech clearly did not license a teacher to substantially disrupt and interfere with the normal operations of his or her employer. The court also found that expressive conduct which may not justify criminal or civil liability may nonetheless be the subject of employer discipline. In a separate concurrence, Judge Brauer stated that "if that is protected speech, if a university is compelled to retain such a man in its employ, and retain him in the capacity of mentor, the Constitution of the United States is the instrument of its self-destruction."[51]

The balancing of interests required in *Pickering* has also affected employee First Amendment rights with reference to union membership and speech in

---

[48] 172 Cal. App. 3d 322, 218 Cal. Rptr. 228 (1985).

[49] 393 U.S. 503 (1969).

[50] *Id.* at 513.

[51] 218 Cal. Rptr. at 245.

connection with union activity. In *Germann v. City of Kansas City*,[52] Germann, a fire captain, was eligible for a promotion to battalion chief. The promotion eligibility list ranked candidates according to their performance on a written test. For over two years, Germann had been ranked first on the eligibility list for promotions, but he was not promoted to any of the seven vacancies that arose during that period. Throughout the time period, Germann was also president of the local union; in that capacity, he had frequent public conflicts with the fire chief, John Waas, who was the person ultimately responsible for appointing the battalion chief. Germann sued the city, Waas, and other fire department officials under the Civil Rights Act of 1871, alleging that he was not promoted because of his union activities.[53]

Waas stated that Germann was not promoted because Waas questioned his loyalty and ability to work with the fire chief to implement department policies. Waas contended that department discipline, morale, and efficiency depended upon respect for rank and that he depended upon management employees to implement his policies on a daily basis. Waas referred to a letter he had received from Germann which stated that Waas had torn "the Kansas City fire department to shreds" and had "a pitifully twisted outlook toward the employees of the department."[54]

The court noted that " 'the first amendment is violated by state action whose purpose is . . . to intimidate public employees . . . from taking an active part in union affairs or to retaliate against those who do.' "[55] However, the court further stated that a public employee's right to join and participate in a union must be balanced against, and may be overridden by, the government's interest in efficiency.[56] With regard to the letter written by Germann, the court agreed that the letter addressed a matter of "public concern," but nonetheless found the letter to be unprotected activity because of its tone. Because the letter expressed a degree of personal animosity and distrust, and because personal loyalty to the fire chief was critical to the management structure of the fire department,[57] the court found that the city's failure to promote Germann to batallion chief did not violate the employee's First Amendment rights. According to the court, an employer need not wait for "events to unfold" before taking action to prevent disruption in the work place.[58]

- **Letters of Reprimand**

The *Pickering* test applies not only to discharges and failures to promote, but also to less significant acts—such as the placement of letters of reprimand in

---

[52] 776 E2d 761 (8th Cir. 1985).

[53] *Id.* at 762–3.

[54] *Id.* at 763.

[55] *Id.* at 764; *see* Roberts v. Van Buren Public Schools, 773 E2d 949, 957 (8th Cir. 1985) *citing* Professional Association of College Educators v. El Paso County Community College District, 730 E2d 258, 262 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 248.

[56] 776 E2d at 764; *see Roberts*, 773 E2d at 957 (relying on Pickering v. Board of Education, 391 U.S. at 567).

[57] 776 E2d at 764–5.

[58] *Id.* at 765; *see* Connick v. Myers, 461 U.S. at 152.

teachers' personnel files.[59] In *Gregory v. Durham County Board of Education*,[60] two teachers challenged letters placed in their personnel files, allegedly in retaliation for their criticism of the school administration, on the grounds that such letters damaged their reputation, reduced their opportunities for alternate employment, and chilled their willingness to criticize the administration. Gregory, a teacher, had criticized the scheduling of a mandatory training program for teachers that conflicted with her vacation plans. The court held that these were matters of personal concern subject solely to the scrutiny of the employer. Toggerson, also a teacher, had written an article concerning personal employment concerns. The court found that, although the issues addressed were of a legitimate interest to the public, they also had a personal impact on Toggerson. In balancing Toggerson's free speech interest and her employer's administrative interest, the court found in favor of the exercise of employer discretion in making personnel decisions.

- **Off-Duty Speech**

Speeches made by employees while off duty from their job may also be lawfully suppressed within the confines of the First Amendment. For example, a federal district court in New York held that the New York State Police Department could constitutionally regulate a state trooper's off-duty speech concerning the enforcement of laws relating to drug and alcohol abuse. In *Micilcavage v. Connelie*,[61] a policeman had violated a department regulation by giving a public speech without first obtaining authorization from his superintendent. The policeman received six months probation and a formal letter of censure was placed in his permanent file. In challenging the discipline, the policeman alleged that the regulation violated his First Amendment rights of free speech.

The court responded by nullifying the regulation, while at the same time upholding the State Police action towards the plaintiff. The regulation found to be vague and overbroad in scope, impermissibly restrained employee exercise of First Amendment rights. However, the court upheld the employer's right to restrain the type of speech involved in the case. This speech, although accurate and involving matters of "public interest," related too directly to the policeman's work as a trooper to pass muster. Because the speech concerned the *enforcement* of certain laws, and because law enforcement is the particular province of a policeman, the court held that the State Police Department acted lawfully in restricting such speech activity.

- **False Statements**

A recent decision discussed the impact that false or reckless statements may have on the *Pickering* balance. In *Brasslett v. Cota*,[62] the court held that a fire chief's statements concerning the town's fire-fighting capabilities, although false, were protected under the First Amendment. The town fire chief, Brasslett, asserted

---

[59] *See* Swilley v. Alexander, 629 F.2d 1018 (5th Cir. 1980) (letter of reprimand in personnel file); Columbus Education Association v. Columbus City School District, 623 F.2d 1155 (6th Cir. 1980) (letter of reprimand in personnel file); Yoggerst v. Stewart, 623 F.2d 35 (7th Cir. 1980) (oral reprimand and written reprimand in personnel file).

[60] 591 FSupp. 145 (M.D.N.C. 1984).

[61] 570 FSupp. 975 (N.D.N.Y. 1983).

[62] 761 F.2d 827 (1st Cir. 1985).

in a television interview that the town's fire-fighting capabilities were deficient. The interview was conducted at the fire station where Brasslett appeared in dress uniform. In light of the adverse publicity generated by the interview, the town manager terminated Brasslett.

The town defended the ensuing lawsuit on the basis that the comments made by Brasslett during the interview were recklessly false. In reviewing the record,[63] the court found that, although some of Brasslett's statements were false, they were not made with malice. Noting that the Supreme Court in *Pickering* expressly declined to adopt a *per se* rule directing that false statements knowingly or recklessly made were unprotected, the court recognized that a false statement recklessly made may well create a presumption that the employee's interest in uttering it was subordinate to the government's interest in suppressing it. However, the court preserved the possibility that such a statement might be protected if it resulted in no actual harm to the employer.[64] Thus, falsity and malice were relegated to the ranks of factors to be weighed in the balancing of interests.

On the record in the particular case before it, the court found no objective facts from which malicious intent could be inferred. Noting that erroneous remarks were an "inevitable by-product of unrestrained public debate,"[65] the court stated that to deny protection to false statements negligently made would chill discourse altogether. Therefore, under *Pickering*, erroneous statements of public concern would be protected unless they were shown to have interfered with the employee's performance or the regular operation of the government agency.[66] Since no such finding was made in this case, the discharge was deemed unlawful.

Symbolic Speech

The analysis set forth in *Pickering* and *Connick* for determining public employee First Amendment rights also applies to "symbolic" speech. In *Leonard v. City of Columbus*,[67] the court held that the removal by several black officers of an American flag from their uniforms as an act of protest against racially discriminatory practices in a city's police force constituted symbolic speech which was protected under the First Amendment. The incident arose in connection with peaceful picketing of the Columbus police station by seven off-duty, but uniformed, black policemen. To make the point that the police department's treatment of minorities was not consistent with the ideals represented by the American flag, each picketing policeman removed an American flag emblem from the sleeve of his uniform shirt. Shortly thereafter, the policemen were discharged. The reasons set forth for the discharges primarily concerned the flag incident.

The court of appeals rejected the district court's conclusion that the policemen's conduct was not symbolic speech but a calculated showing of contempt for city

---

[63] Note that in Bose Corporation v. Consumer's Union of U.S., 466 U.S. 485 (1984) the Supreme Court reaffirmed the rule of independent appellate review historically applied in First Amendment cases.

[64] *See Pickering*, 391 U.S. at 574 n. 6 (1968); *cf.* Santos v. Miami Region, U.S. Customs Service, 642 F2d 21, 25 (1st Cir. 1981) (criticisms made with malice or with knowledge that they contained falsehoods may not be protected).

[65] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340–41 (1974).

[66] *See Pickering*, 391 U.S. at 572–73.

[67] 705 F2d 1299 (11th Cir. 1983).

authority. In addressing the policemen's interests, the appellate court concluded that, although the policemen's acts involved conduct as well as pure speech, their interest in expressing themselves was substantial. Noting that the officers in no way mutilated or defaced the flag—but, rather, expressed a deep respect for it and the principles it represented—the court stated that removal of the patch under those circumstances bore great similarity to protected speech. Although the conduct of the policemen violated a department regulation requiring all policemen to wear a flag patch, the court held that the police department's interest in having the patch worn must bow to the greater interest of the policemen in exercising their free speech rights.

Another decision involving symbolic speech further illustrates the thin line the courts have drawn in determining what subjects are to be considered a matter of "public interest." In *Wilson v. City of Littleton, Colorado*,[68] Wilson, a policeman, was fired as a result of his refusal to obey an order to remove a black shroud which he wore to mourn the death of a policewoman from another town. Wilson alleged that the termination unlawfully infringed his freedom of speech. Regarding Wilson's First Amendment claim as symbolic speech rather than as pure speech, the lower court relied upon the analysis set forth in *United States v. O'Brien*.[69] The appellate court rejected this application, stating that in public employee cases, whether actual or symbolic speech is involved, the proper analysis is that established in *Pickering* and *Mount Healthy City School District*. The appellate court predicated its position upon uniform rejection of the old notion "that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable."[70] However, with reference to the guidelines set forth in *Connick*, the court found that Wilson's acts did not involve a matter of public concern. While recognizing that the death of a police officer could conceivably be a topic of general interest to the public under other circumstances,[71] the court held that Wilson's personal feelings of grief were not a matter of public concern within the meaning of *Connick*.

Political Affiliations

Where the discharge of a public employee is based solely upon the employee's political affiliation, the Supreme Court has already performed the required balancing of interests and has determined that the only governmental interest sufficient to justify such a discharge is the need to ensure that the will of the electorate is carried out.[72] "Therefore, unless party affiliation affects the discharged employee's ability to effectively perform her job, a politically-motivated

---

[68] 732 F.2d 765 (10th Cir. 1984).

[69] 391 U.S. 367 (1968), where the Court held that conduct combining "speech" and "nonspeech" elements can be subject to government regulation if four requirements are met: (1) the regulation is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) that interest is unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of governmental interests.

[70] Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[71] 732 F.2d at 769 n. 2 (1984), where the court noted that, if a police officer were shot during an ongoing public controversy over the expenditure of public funds to purchase bullet proof vests for the police force, the topic of police officers' deaths would be of general interest.

[72] *See* Elrod v. Burns, 427 U.S. 347 (1976); *see also*, Avery v. Jennings, 604 FSupp. 1356, 1361 (S.D. Ohio 1985).

discharge represents an impermissible infringement on the employee's First Amendment rights."[73]

In *Elrod v. Burns*,[74] the Supreme Court struck down the practice of replacing non-civil-service employees with members of the newly elected official's political party. Justice Brennan stated that patronage dismissals were generally inconsistent with the First Amendment and were to be allowed only with reference to dismissals of those in policy-making positions.

- **"Policymakers"**

The troublesome aspect in these types of decisions is determining who is a "policymaker." In *Gonzalez v. C.Y. Benavides*,[75] Gonzalez, an executive director of a community action agency, spoke out publicly against the county commissioners' court and its supervisory authority over him. Upon his refusal to retract the statement, the commissioners fired him. Gonzalez alleged that his dismissal violated his First Amendment rights.

In justifying the "policymaker" exception, the court asserted the government's interests (1) in ceding to elected officials the power to implement policy for which they must answer to the voters, and (2) in maintaining security in the relationships between elected officials and certain high-level executives to whom authority has been delegated. The court noted that the First Amendment does not require elected officials to sit passively while their appointed chief executive publicly disavows the officials' authority over him. In this particular case, Gonzalez, as executive director, possessed broad, discretionary responsibilities with loosely defined objectives. The court concluded that this position could fall within the "narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech." Since the trial judge did not evaluate the evidence with the governmental interest of protecting such relationship in mind, the decision was remanded.

In *Gossart v. Dinaso*,[76] a town bookkeeper alleged that she was discharged from her employment because of her politics, in violation of her First and Fourteenth Amendment rights. The court reiterated its test for determining if one is a policymaker: "whether the position held by the individual authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation."[77] On the facts, the court adopted the district court's finding that the town bookkeeper was not a policymaker. As a non-policymaker, the bookkeeper had the right to refrain from rendering political support to members of the town board of trustees, and she had the right to sympathize with the opposing political party. Nonetheless, she could be required to act loyally towards the town board of trustees and to take actions on behalf of a board member that inured to his political benefit. At bottom, the court recognized that public employees can be constitutionally required to enforce policies of which they disapprove.

---

[73] Avery v. Jennings, 604 ESupp. 1356, 1362 (S.D. Ohio 1985).

[74] 427 U.S. 347 (1976).

[75] 712 F2d 142 (5th Cir. 1983).

[76] *Id.* at 150.

[77] 758 F2d at 1126; *see also* Nekolny v. Painter, 653 F2d 1164, 1170 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 1719.

A recent case extended the parameters of the "policymaker" exception to relatives of the policymaker. In *Shondel v. McDermott*,[78] the stepdaughter of the Superintendent of Parks was discharged from her job as receptionist for a city department. Her stepfather, who was also discharged, had campaigned against the successful candidate in a recent mayoral election. The court rebuffed the stepdaughter's First Amendment challenge to her discharge for two reasons. First, the threat of discharge of relatives has no prohibited chilling effect upon policymakers, such as her stepfather, because the speech rights of policymakers are unprotected anyway.[79] Second, the discharge of relatives of political opponents does not unduly fetter the speech rights of other employees in the absence of evidence, found lacking in the *Shondel* case, of a widespread practice of retaliation.[80] Therefore, the discharge of the stepdaughter violated neither her right of free speech nor her right of family association.[81] According to the court, to allow every discharged employee to bring a First Amendment suit based upon an allegation of hostility to a policy-making relative would trivialize the great objects of the First Amendment.[82]

- **"Clean Hands"**

The *Shondel* case also dealt with the issue of the "clean hands" doctrine in First Amendment cases. Another disgruntled discharged employee in that case was the city's Transportation Coordinator, a man named McKechnie. Although not considered a policymaker, McKechnie headed a city department which received federal funds. In response to McKechnie's claim that his discharge for campaigning for the mayor's opponent violated his First Amendment rights, the city defended on the basis of "unclean hands"—*i.e.*, that McKechnie's campaign activity violated the Hatch Act which prohibits local government employees connected with a government activity receiving federal financing from using their official capacities to affect the results of an election.

Although finding that McKechnie may have had "unclean hands" owing to a Hatch Act violation,[83] the court issued a preliminary injunction ordering his reinstatement. According to the court, the "clean hands" doctrine operates as a bar to First Amendment claims only when there is a close nexus between the requested relief (reinstatement) and the misconduct.[84] Since McKechnie's ability to function as the Transportation Coordinator was not impaired by virtue of the fact that he may have violated the Hatch Act, his "unclean hands" did not negate his right to speak out on matters of public concern without retribution.

- **Hiring v. Discharge**

A few recent cases grappled with the analysis to apply in political activity cases involving employment decisions other than discharges. In *Avery v. Jennings*,[85] an

[78] 775 E2d 859 (7th Cir. 1985).

[79] *Id.* at 864.

[80] *Id.* at 865.

[81] *Id.* at 865.

[82] *Id.* at 865.

[83] *Id.* at 862.

[84] *Id.* at 870.

[85] 604 ESupp. 1356 (D.C. Ohio 1985).

unsuccessful applicant for public employment sued the public employer under the First Amendment, claiming that her political affiliation was a substantial factor behind her inability to obtain employment. The court noted that *Elrod v. Burns*, the first decision invalidating discharges of public employees on the basis of their political beliefs or affiliations, represented a very narrow subclass of cases involving *discharge* as a result of the exercise of First Amendment rights. Moreover, according to the court, no decided case had extended the rationale of *Elrod* to situations involving employment decisions other than discharge,[86] and recent Supreme Court treatment of *Elrod* evidenced no desire to extend the application of that case beyond its particular facts. Therefore, the court found that Avery's claim was not governed by *Elrod* principles, but rather should be considered under broader precepts of First Amendment rights of public employees, including balancing the interests involved in inquiring as to whether the employer would have reached the same decision absent the protected conduct.[87]

On the facts, the court held that, even if Avery could establish that her political affiliation was a substantial factor in her failure to obtain employment, the defendants had met their *Mount Healthy* burden by establishing by a preponderance of the evidence that Avery would not have been hired regardless of her political affiliations. In vindicating the public employer, the court focused on the facts that: (1) clerical workers were laid off in the month in which Avery filed her employment applications and such employees would have been given the first opportunity to fill any vacancies; and (2) none of the defendants saw Avery's application until after she had filed her lawsuit.[88]

The Minnesota Supreme Court reached a contrary result in a recent refusal-to-hire case. Indeed, the case, *Cybyske v. Independent School District No. 196*,[89] also involved some *Shondel* considerations in that the applicant alleged that she was not hired because of her *husband's* views. Cybyske, the applicant for a teaching position, was married to a member of the school board of a neighboring school district. Her husband was known as a "vocal, controversial advocate for a bigger voice for teachers in school district decisionmaking."[90] Cybyske filed a lawsuit under the First and Fourteenth Amendments, alleging deprivations of her constitutional rights of freedom of association and freedom of choice in marriage.

Without ever mentioning *Elrod*, the court gave cognizance to a free association claim predicated upon a denial of employment because of a spouse's political position. In an interesting bootstrapping maneuver, the court tied Cybyske's free association claims to free speech principles: because Cybyske's husband was exercising his First Amendment rights in expressing his views, the free speech protections inured to the benefit of Cybyske through the freedom of association aspects of the First Amendment.[91] Therefore, the court applied a *Pickering*-type balancing analysis in the context of associational rights. Finding that Cybyske's effectiveness as a teacher was not impaired because of her husband's activities

---

[86] 604 FSupp. at 1362. *Cf.* Delong v. United States, 621 F.2d 618, 624 (4th Cir. 1980) wherein one court has held that *Elrod* may apply to invalidate a transfer and reassignment that was "the substantial equivalent of dismissal."

[87] 604 FSupp. at 1362.

[88] *Id.* at 1364.

[89] 347 N.W.2d 256 (Minn. 1984), *cert. denied*, ___U.S. ___, 105 S. Ct. 330 (1984).

[90] 347 N.W.2d at 259.

[91] *Id.* at 262.

with a neighboring school board, the court held that Cybyske's right of free association superseded the school district's interests.[92] As to the claimed infringement of the freedom of choice in marriage, the court declined to establish a "new rights-in-marriage claim" under the federal constitution.[93]

Sexual Preferences

- **Public Concern**

Although matters of sexual preference arguably involve significant privacy rights of individuals, First Amendment rights in this context are circumscribed in that sexual preference has not generally been viewed as a matter of "public concern." In *Rowland v. Mad River Local School District*,[94] Rowland, a guidance counselor, had communicated to several teachers and administrators that she was bisexual and had a female lover. Thereafter, Rowland was suspended from her job with full pay. When the district court entered a preliminary injunction against the suspension, the employer reassigned her to a new position with no student contact. At the end of the school year, Rowland's teaching contract was not renewed. Rowland filed suit charging that the reassignment and failure to renew her contract violated her First Amendment rights.[95]

Analyzing the allegations in light of *Connick*, the court held that Rowland's statements were not protected speech. The issue of bisexuality among school personnel was deemed solely a matter of personal interest. Indeed, Rowland herself recognized that her bisexuality was not a matter of public concern by requesting that the comments about her sexual preference be kept confidential.[96] Therefore, the First Amendment was unavailing to protect Rowland's job.

Another interesting aspect of the *Rowland* case is the court's discussion of the potential liability of the school district for employment decisions made by the superintendent. The fact that the superintendent acted on behalf of the school district in suspending and transferring Rowland was not sufficient to hold the school district liable for these acts: a local government cannot be held liable for the acts of its employees or officers on a respondeat superior theory.[97] On the other hand, liability may be predicated upon an unconstitutional act performed by an officer or employer in carrying out a policy or custom of the employer.[98] In the *Rowland* case, there was no evidence of a policy or custom at the school of suspending counselors for their sexual preferences or for homosexual or bisexual conduct. Thus, the school district could not be held liable anyway for the superintendent's acts of suspending and transferring Rowland.[99]

---

[92] *Id.* at 263; *see, e.g.*, Givhan v. Western Line Consolidated School District, 439 U.S. 410, 415 n. 4 (1979).

[93] 347 N.W.2d at 263.

[94] 730 F2d 444 (6th Cir. 1984).

[95] *Id.* at 446.

[96] *Id.* at 449.

[97] Bowen v. Watkins, 669 F2d 979 (5th Cir. 1982), *reh'g denied* 710 F2d 837 (1983).

[98] Monell v. Department of Social Services of The City of New York, 436 U.S. 658 (1978). Beyond the scope of this paper are the questions that remain after *Monell*—*i.e.*, what constitutes a "custom" or "policy," and under what circumstances an act by a public official represents "municipal policy" sufficient to trigger liability.

[99] 730 F2d at 450–451.

- **Employment Regulations**

Some public employers have regulations concerning sexual preference which appear to clash with employee First Amendment rights. In *Johnson v. Orr*,[100] Johnson was discharged pursuant to a military regulation of the Air National Guard which mandated the separation of homosexuals as unfit for military service. Johnson notified her commanding officer by letter that she was a lesbian and that this sexual preference would not conflict with her ability to perform her military duties. Upon receipt of the letter, an administrative board of officers decided to discharge Johnson for violation of the military regulation concerning homosexual conduct.[101]

Reviewing the military board's action, the court found that Johnson's letter to her commanding officer was not protected by the First Amendment. Noting that the letter did not seek to inform the public in general or to advocate public policy changes, the court found it to be communication by an employee upon a matter of personal concern and not a communication by a citizen upon matters of public concern. Nonetheless, the court noted that, if Johnson had made a speech espousing or denouncing either side of the debate, such comments would enjoy the protections of the First Amendment.[102]

The legality of employment regulations or statutes providing for dismissal or suspension of employees because of homosexual conduct is often litigated. In *National Gay Task Force v. Board of Education of the City of Oklahoma City*,[103] homosexuals brought an action challenging the constitutional validity of a state statute which provided for the dismissal or suspension of teachers for engaging in "public homosexual conduct." Addressing the argument that the statute violated the teachers' rights of privacy, the court upheld the statute as valid because it constrained only *public* homosexual activity and did not interfere with private conduct.[104] Turning to the free speech challenge to the statute, the court took constitutional offense at the statutory definition of "public homosexual conduct" to the extent that it included "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees."[105] The court noted that the First Amendment protects "advocacy," even of illegal conduct, except when "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[106] Thus, the statute's proscription of advocating, encouraging, or promoting homosexual activity was held to be unconstitutionally overbroad and was ordered severed from the statute.[107]

---

[100] 617 FSupp. 170 (E.D. Cal. 1985).

[101] *Id.* at 171–72.

[102] *Id.* at 176–77.

[103] 729 F2d 1270 (10th Cir. 1984), *aff'd.*, 105 S.Ct. 1858 (1985).

[104] *See* Lovisi v. Slayton, 539 F2d 349 (4th Cir. 1976).

[105] 729 F2d at 1274.

[106] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[107] 729 F2d at 1274–75.

- **Religious Aspects**

Issues of sexual preference can involve other First Amendment freedoms in addition to the freedom of speech. In *Madsen v. Erwin*,[108] the freedom of religion was implicated. The case involved a female sportswriter fired by the *Christian Science Monitor* after admitting that she was a lesbian. In fact, the *Monitor* discharged Madsen because she was a homosexual who had refused to seek healing within the church. In addition to protesting her discharge under the First Amendment, Madsen sought damages for wrongful discharge, defamation, invasion of privacy, intentional infliction of emotional distress, discrimination on the basis of sexual preference, and breach of fiduciary responsibility.[109]

The court rejected the First Amendment claim on the basis of the church's right to exercise its freedom of religion.[110] Regarding the *Monitor*, which hired only church employees, as an arm of the church, the court found that the *Monitor's* firing of Madsen was in furtherance of an announced church policy against employing homosexuals who refused to seek healing within the church. The court refrained from interfering with church policies on the ground that it is not the province of the courts to question the verity of religious beliefs or doctrines.[111] "In view of the preferred position which the freedom of religion holds in the pantheon of constitutional rights," the court held that Madsen's asserted rights must yield to the church's right to enforce religious policies.[112]

Nevertheless, the court did permit Madsen to pursue her tort claims of defamation, invasion of privacy, and intentional infliction of emotional distress in connection with her discharge. As the court pointed out, although the First Amendment prevents the court from inquiring into or penalizing a church's religious beliefs, it does not preclude the state from regulating potentially tortious conduct by the church.[113]

Other Related Issues

- **Dating**

The First Amendment protections for employees include protection of employee conduct as well as employee speech. Related First Amendment topics include an employee's right of privacy and association. In a recent decision, the Oregon Court of Appeals found that an employee fired for dating a co-worker may sue the employer for the tort of outrageous conduct. In *Patton v. J.C. Penney Co.*,[114] Patton had been warned by his supervisor to discontinue a dating relationship with a female co-worker, even though J.C. Penney had no general policy prohibiting socializing among employees. Patton continued to date the co-worker and, sometime thereafter, he was discharged allegedly for poor job performance. In the ensuing lawsuit, Patton alleged that J.C. Penney had violated his constitution-

---

[108] 395 Mass. 715, 481 N.E. 2d 1160 (1985).

[109] 481 N.E.2d at 1160.

[110] Inexplicably, the court by-passed the threshold jurisdictional question of whether there was sufficient state action to subject the newspaper to constitutional constraints.

[111] 481 N.E.2d at 1164–65.

[112] *Id.* at 1165–66; *see also* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

[113] 481 N.E.2d at 1167.

[114] 75 Or. App. 638, 707 P.2d 1256 (1985).

ally protected rights of privacy and freedom of association.[115] Although rejecting such claims as inapplicable in the private sector, the court recognized the viability of a tort claim by Patton against J.C. Penney. According to the court, since the employer's decision to fire Patton went beyond the limits of "social toleration" and had the "predictable effect" of causing emotional distress, Patton had the right to recover for "outrageous conduct."[116]

In the public sector, dating has been found to be protected by right of association under the First Amendment. In *Wilson v. Taylor*,[117] a police officer was terminated for dating a woman who was the daughter of a convicted felon reputed to be a key figure in organized crime. Relying on *Sawyer v. Sandstrom*,[118] the court stated that the First Amendment right of free association applies not only to situations where an "advancing of common beliefs occurs," but also to purely social and personal associations.[119] Thus, here, no recognition was given to *Connick* principles in the context of associational rights. The court concluded that firing the policeman was a violation of these rights.

- **Marital Status**

Areas other than speech, such as marital status, have been held to be protected from employer abuse by constitutional principles. In *Littlejohn v. Jack Rose*,[120] it was held that a public school teacher's involvement in divorce proceedings could not lawfully be a basis for a refusal to renew her contract. Recognizing that marital status is protected by the constitutional right of privacy, the court remanded the case for a new trial on the teacher's claim that her divorce proceedings were the motivating factor in the refusal to rehire her.[121]

- **Right of Association**

Issues concerning First Amendment rights of association are also raised with some frequency in union activity cases. In *Wilton v. Baltimore*,[122] two corrections officers alleged that their supervisors violated their First Amendment rights by using their union membership and activities to bar their promotions. The two officers were prominent members of the jail-employees union and had played a leading role in a controversial jail strike. Following rejections for promotion by a reviewing panel, the officers filed suit contending that they were not promoted due to their union activity.[123]

At the outset, the court noted the unsettled status of the First Amendment protection accorded union organizing activities by public employees. The court resolved the dilemma by analogizing limitations on the public employees' asserted constitutional right of association to the limitations recognized on public employ-

---

[115] 707 P.2d at 1257.

[116] *Id.* at 1260.

[117] 733 F.2d 1539 (11th Cir. 1984).

[118] 615 F.2d 311 (5th Cir. 1980).

[119] 733 F.2d at 1544.

[120] 768 F.2d 765 (6th Cir. 1985).

[121] *Id.* at 771.

[122] 772 F.2d 88 (4th Cir. 1985).

[123] *Id.* at 90.

ees' First Amendment rights to speak on matters of public concern.[124] Applying *Connick* principles, the Court found that the jail management legitimately decided that the two officers could not serve both masters, namely the union and management, and that the employer's attention to "conflicting tugs of allegiance" violated none of the officers' constitutional rights.[125]

One recent decision explicitly considered whether *Connick* and its analysis applies to an employee's right of association as well as free speech. In *Boals v. Gray*,[126] a correctional officer alleged that he was suspended for union activity in violation of his First Amendment right of freedom of association. The court held that there was no logical reason for differentiating between speech and association in applying *Connick* to First Amendment claims. The court also concluded that an employee's speech, activity, or association does not, merely by virtue of being union-related, necessarily touch upon matters of public concern as required by *Connick*. However, the court went on, in seeming contradiction, to assert "that an employee who is disciplined solely in retaliation for his membership in and support of a union states a valid First Amendment claim under *Connick* and *Pickering*."[127] In any case, in *Boals*, the court found no evidence of prohibited retaliation: the employer did not even know that the corrections officer was a member of the union, let alone discharge him for reasons of union animus.

CONCLUSION

The right of public employee free speech has been the ongoing subject of litigation in this country for nearly two decades. The *Connick* decision three years ago fueled the judicial dialogue between the competing interests of employee free speech and employer efficiency. However, as the decisions in the wake of *Connick* evidence, *Connick* by no means eliminated the conflict. *Connick* is merely a stepping stone along the path towards resolution of this thorny issue for public employers.

---

[124] *Id.* at 90–91.

[125] *Id.* at 91–92.

[126] 775 F.2d 686 (6th Cir. 1985).

[127] *Id.* at 693. *See* Gossert v. Dinaso, 758 F.2d 1221, 1230 n. 12 (7th Cir. 1985); *see also* Professional Association of College Educators v. El Paso County Community College District, 730 F.2d 258, 262–63 (5th Cir. 1984).

Religion in the Schools— The Year in Review

by: Jeffrey A. Davis

INTRODUCTION

This article will discuss recent court decisions regarding several issues concerning religion in the schools. These issues include: school prayer and meditation, aid to parochial schools, equal access, home schooling and compulsory attendance, accommodation of employee's religious beliefs, creationism, religious objections to curriculum, and invocations and benedictions.

The most interesting legal issue concerning religion in the schools in 1985 was the struggle among the members of the Supreme Court over the appropriate analytical vehicle for assessing claims of Establishment Clause violations. Decisions by the Supreme Court in recent years in *Mueller v. Allen*, *Marsh v. Chambers* and *Lynch v. Donnelly*[1] in which the Court upheld various state practices against claims of Establishment Clause violations, gave the appearance that the *Lemon v. Kurtzman*[2] three part test had been weakened to such an extent that its viability had become questionable. Nevertheless, a majority in *Wallace*, *Grand Rapids* and *Aguilar*[3] relied on the *Lemon* analysis. The Court in *Grand Rapids*, quoting from prior decisions in *Mueller v. Allen*[4] and *Meek v. Pittenger*,[5] noted that the *Lemon* test guides the nature of the inquiry but "must not be viewed as setting the precise limits to the necessary constitutional inquiry."[6] Nevertheless, a majority of the Court expressly "reaffirm[ed] that state action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria."[7]

Justice Brennan in *Grand Rapids* perhaps offered an explanation for what may have appeared to be an abandonment of the *Lemon* tests in *Marsh v. Chambers*, and *Lynch v. Donnelly*, by observing that those cases did not involve school

---

[1] Mueller v. Allen, 463 U.S. 388 (1983); Marsh v. Chambers, 463 U.S. 783 (1983); and Lynch v. Donnelly, 465 U.S. 668 (1984).

[2] 403 U.S. 602, 612–613 (1971).

[3] Wallace v. Jaffree, Grand Rapids School District v. Ball and Aguilar v. Felton, decided by the Supreme Court in 1985, will be discussed below.

[4] 463 U.S. 388 (1983).

[5] 421 U.S. 349 (1975).

[6] Grand Rapids School District v. Ball, ___U.S. ___, 105 S.Ct. 3216, 3222 (1985).

[7] *Id.*, at 3223.

children.[8] In *Marsh v. Chambers*, the Court upheld Nebraska's practice of paying a chaplain to open its legislative sessions with an invocation and prayer. The *Marsh* opinion did not appear to use the *Lemon* test.

In *Lynch v. Donnelly*, the Court upheld the practice of the City of Pawtucket, Rhode Island, of including a nativity scene in its Christmas time display. The Court in *Lynch*, per Chief Justice Burger, eschewed the *Lemon* test as the appropriate vehicle for the resolution of every Establishment Clause question.[9] Justice O'Connor, concurring in *Lynch*, wrote "separately to suggest a clarification of our [the Court's] Establishment Clause doctrine."[10] These remarks prompted Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, in dissent, to challenge "the Court's less than vigorous application of the *Lemon* test" [as suggested] "that its commitment to those standards may only be superficial."[11]

The Court's return to the *Lemon* test in *Wallace*, *Grand Rapids* and *Aguilar* in this context may be attributable to the presence of school children. Justice Brennan, in *Grand Rapids*, warned that an important concern of the second prong of the *Lemon* test is whether the symbolic union of church and state effected by the challenged governmental action is likely to be perceived as an endorsement or a disapproval of religious choices. This inquiry "must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years."[12]

Although the three part *Lemon* test still finds favor among a majority of the Court, Justices Rehnquist, White, O'Connor and the Chief Justice appear to be either arguing for abandonment or modification of the test or its employment only for "guidance" when helpful. For instance, during the past year the Chief Justice, in *Thornton v. Caldor*[13] "relied" on the *Lemon* test "for guidance", and in a minority opinion, *Wallace v. Jaffree*, chastised the majority's "naive preoccupation with [the *Lemon* test as] an easy, bright-line approach for addressing constitutional issues."[14] Of course, the debate over the appropriate analytical test is often actually a debate over the result.

Aside from the legal issues argued in 1985, if any discernible thread appears throughout the reported decisions, it is that the more government wants religion in the schools, the less likely efforts to that end will be successful. For example, Justice Powell, considered by some to be a "swing" vote on the Supreme Court,[15]

---

[8] "We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children. The government's activities in this area can have a magnified impact on impressionable young minds, and the occasional rivalry of parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic." *Id.*, at 3222–23.

[9] *Lynch*, 104 S.Ct., at 1361.

[10] *Id.*, at 1366.

[11] *Id.*, at 1370–71. Justice Brennan continued his criticism of the Court's analysis in a footnote, adding: "Although I agree with the Court that no single formula can ever fully capture the analysis that may be necessary to resolve difficult Establishment Clause problems, . . . , I fail to understand the Court's insistence upon referring to the settled test set forth in *Lemon* as simply one path that may be followed or not at the Court's option." *Id.*, at 1371, n. 2.

[12] *Grand Rapids*, 105 S.Ct., at 3226; *cf.* Widmar v. Vincent, 454 U.S. 263 (1981) (college students less likely to perceive government neutrality as endorsement).

[13] ___ U.S. ___, 105 S.Ct. 2914, 2917 (1985).

[14] Wallace v. Jaffree, ___U.S. ___, 105 S.Ct. 2479, 2507 (1985).

[15] *See, e.g.*, 71 A.B.A.J. 61, 62 (1985).

voted in *Wallace v. Jaffree* to invalidate Alabama's voluntary prayer statute because of the state's "persistence" in promoting school prayer.[16] This phenomenon occurred in two different cases involving challenges to the practice of allowing a religious invocation and benediction at high school graduation exercises. The practice was enjoined where the school board was in charge of the ceremony and insisted on having an invocation and benediction[17] but was permitted where the school board did not seem to care and allowed the students to plan their own graduation exercises which included an invocation and benediction.[18] These decisions and other 1985 cases involving religion in the schools will be discussed in this article.

PRAYER MEDITATION

In 1962, the Supreme Court held the Establishment Clause of the First Amendment[19] that prohibits a requirement of daily prayer in public school classrooms. Since then, the issue has been continually addressed by the courts and by Congress.

Wallace v. Jaffree[20]

From 1978 to 1982 the legislature of the State of Alabama enacted three different statutes allowing periods of silence and/or prayer in the public schools in the State of Alabama: (1) §16–1–20, enacted in 1978, authorizing a one-minute period of silence in all public schools "for meditation;" (2) §16–1–20.1, enacted in 1981, authorizing a period of silence "for meditation or voluntary prayer;" and (3) §16–1–20.2, enacted in 1982, authorizing teachers to lead "willing students" in a prescribed prayer to "almighty God . . . the Creator and Supreme Judge of the world."

The Supreme Court in 1984, without opinion, agreed with the decision of the Court of Appeals for the Eleventh Circuit which held that the prayer to "almighty God" provision of the Alabama Code, §16–1–20.2, was unconstitutional and violative of the Establishment Clause of the First Amendment.[21] Although §16–1–20 of the Code, authorizing a period "for meditation," was initially challenged by Mr. Jaffree[22], it was determined to be valid and no appeal was taken from that decision.[23]

---

[16] *Wallace*, 105 S.Ct., at 2493.

[17] Graham v. Central Community School District of Decatur County, 608 FSupp. 531 (S.D. Iowa 1985).

[18] Stein v. Plainwell Community Schools, 610 FSupp. 43 (W.D. Mich. 1985).

[19] Engel v. Vitale, 370 U.S. 421 (1962); *see also*, Abington Township School District v. Schempp, 374 U.S. 203 (1963).

[20] *Supra*, n. 14; ___U.S. ___, 105 S.Ct. 2479 (1985).

[21] 466 U.S. ___, 104 S.Ct. 1704 (1984).

[22] *See*, Jaffree v. Board of School Commissioners of Mobile County, 554 FSupp. 1104 (S.D. Ala. 1983).

[23] *Id.*, at 1128; *see also*, *Wallace*, 105 S.Ct., at 2482.

The question before the Supreme Court in 1985 was whether §16–1–20.1, authorizing a period of silence for "meditation or voluntary prayer,"[24] violated the Establishment Clause. Two issues were addressed by the Court.

The first concerned the dubious conclusion of the district court that the Establishment Clause had been misconstrued by the Supreme Court and in actuality does not bind the sovereign states. The Supreme Court found the district court's conclusion "remarkable;" in rejecting it, the Court wrote: "to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States."[25]

Second, the Court analyzed the merits of the case by applying the three part *Lemon* test.[26] The Supreme Court found that the first part of the test, requiring that the statute have a secular legislative purpose, was "most plainly implicated by this case."[27] The Court explained that a statute that is motivated in part by a religious purpose may pass the first *Lemon* prong so long as it has at least in part a secular purpose. On the other hand, "the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion."[28] The Court held that the evidence, including: (1) testimony of a sponsor, (2) an admission made by one of the parties in a pleading filed in the case, (3) the legislative history and (4) language of the statute itself, made clear that the statute was enacted for the purpose of promoting prayer.[29] The Statute failed the first part of the *Lemon* test and therefore violated the First Amendment.[30]

Justice Powell pointed out that even though the validity of two of the three statutes was not directly in issue,[31] his concurrence in the opinion and judgment was "prompted by Alabama's *persistence* in attempting to institute state-sponsored prayer in the public schools by enacting three successive statutes."[32] (emphasis added.) He also wrote separately "to respond to criticism of the three-pronged

---

[24] Alabama Code §16–1–20.1 provides:
"At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in." *cited in*, *Wallace*, 105 S.Ct., at 2481, n. 2.

[25] *Wallace*, 105 S.Ct., at 2486; *Id.*, at 2484.

[26] "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [citation omitted]; finally, the statute must not foster 'an excessive government entanglement with religion.' [citation omitted]." Lemon v. Kurtzman, 403 U.S. 602, 612–613 (1971).

[27] *Wallace*, 105 S.Ct., at 2490.

[28] *Id.*, The court also noted that although it would generally be presumed that a statute was enacted for some purpose, if in fact a statute at issue had "no purpose", the statute would not have a "secular purpose" and, therefore, the first part of the *Lemon* test would not be satisfied. *Id.*, at 2492, n. 48.

[29] In the opinion of the Court, Justice Stevens argued that since Alabama already had a law authorizing a silent minute "for meditation", the only reason for the enactment of [16–1–20.1, adding that the silent minute could be used also for "voluntary prayer", was to suggest that prayer was the preferred mode of spending one's moment of silence. *Id.*, at 2492.

[30] *Id.*, at 2493.

[31] *Id.*, at 2493, n. 1.

[32] *Id.*

Lemon test."[33] He stressed that *Lemon* had not been overruled nor its test modified. Since the *Lemon* decision, the Court had addressed an Establishment Clause issue without resort to *Lemon*'s three pronged test in only one case, *Marsh v. Chambers*.[34] Yet, he argued, "continued criticism of it [the test] could encourage other courts to feel free to decide Establishment Clause cases on an *ad hoc* basis."[35]

Justice O'Connor, concurring in the judgment, wrote a separate opinion to announce that in her view all aspects of the *Lemon* test should not be abandoned. Instead, she elaborated on the "endorsement test" she had "proposed as a refinement of the *Lemon* test" in her concurring opinion in *Lynch v. Donnelly*.[36] In applying the proposed "endorsement test", the "inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."[37] For O'Connor, the Alabama statute at issue in *Wallace* did not meet the endorsement test.

Chief Justice Burger, Justice White and Justice Rehnquist dissented, each writing separate opinions. Chief Justice Burger criticized the Court's application of the *Lemon* test, stating that "our [the Court's] responsibility in Establishment Clause cases is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion."[38] The Alabama statute at issue in *Wallace*, according to the Chief Justice, simply accommodated religion in a neutral and noncoercive manner. Burger labelled "ridiculous" the suggestion that the statute is a "step toward creating an established church."[39]

Justice White argued in dissent that a teacher if asked by a student whether the student could pray during a moment of silence, the teacher would be hard pressed to answer in any way but affirmatively. Therefore, to Justice White, the Alabama statute merely provided the *legislative* answer to the question, "May I pray?". With respect to the continued acceptance of the *Lemon* test, Justice White noted that he had been "out of step" with many of the Court's Establishment Clause decisions; he would support a "basic reconsideration" of the Court's religion precedents.[40]

Justice Rehnquist, in his dissenting opinion, provides a fascinating discussion of the history of the religion clauses of the First Amendment. The thrust of Justice Rehnquist's dissent is that the Supreme Court's religion cases, beginning with *Everson v. Board of Education*,[41] are based on a faulty historical premise creating an unsound doctrinal basis for later decisions. According to Rehnquist, the

---

[33] *Id.*

[34] *Supra*, n. 1, 463 U.S. 783 (1983).

[35] *Wallace*, 105 S.Ct., at 2494.

[36] *Supra*, n. 1, 465 U.S. 668 (1984).

[37] *Wallace*, 105 S.Ct. at 2497.

[38] *Id.*, at 2507.

[39] *Id.*

[40] *Id.*, at 2508.

[41] 330 U.S. 1 (1947).

unworkability of the *Lemon* test has resulted in the Court's inability to employ it satisfactorily without yielding contradictory or conflicting results.[42]

May v. Cooperman

In a post-*Wallace* decision, *May v. Cooperman*,[43] the Third Circuit recently held that a New Jersey statute requiring public elementary and secondary school officials to "permit students to observe a 1 minute period of silence . . . for quiet and private contemplation or introspection" was unconstitutional because it did not have a secular purpose. The court acknowledged that the different opinions in *Wallace* suggest that a statute which allows a moment for meditation but does not mention prayer, may be constitutional. However, because of the facts in this case the trial court found that the statute had a religious and not a secular purpose. The court of appeals held that this finding was not clearly erroneous and the trial court's determination of unconstitutionality was affirmed.

Breen v. Runkel

In *Breen v. Runkel*,[44] the court dismissed a claim by teachers, students and parents that the state superintendent of public instruction violated their constitutional rights by ordering a local school district to take action to stop certain teachers from praying and reading the Bible in the classroom. The court held that even though the conduct at issue was that of individual teachers, not the official action of the school district, the Supreme Court's decisions in *Engel*[45] and *Abington*[46] were controlling. The court dismissed the claims of the teachers who wanted to continue the religious activities and the claims of the students and parents who wanted the religious activities to continue.[47]

Bell v. Little Axe Independent School District No. 70

The case of *Bell v. Little Axe Independent School District No. 70*,[48] a suit for damages as well as injunctive relief, was brought by parents of school children to stop religious activities at school during school hours and to obtain a declaration that the Oklahoma voluntary prayer statute[49] was unconstitutional. The court found it unnecessary to determine the constitutionality of the Oklahoma prayer statute because the school district had not relied on the statute in allowing certain religious practices to take place on school grounds.[50]

---

[42] "These difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three part test represents a determinedeffort to craft a workable rule from an historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service." 105 S.Ct., at 2518.

[43] 780 F.2d 240 (3d Cir. 1985).

[44] 614 FSupp. 355 (W.D. Mich. 1985).

[45] *Supra*, n. 19.

[46] *Id.*

[47] The court held that the plaintiffs failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

[48] 766 F.2d 1391 (10th Cir. 1985).

[49] Okla. Stat. tit. 70, [11–101.1 (1981).

[50] *Bell*, 776 F.2d, at 1401. This case will be discussed in greater detail in the Equal Access section of this paper.

AID TO PAROCHIAL SCHOOLS

Grand Rapids School District v. Ball

In *Grand Rapids School District v. Ball*,[51] the Supreme Court considered the question of whether two programs providing state aid to parochial schools violated the Establishment Clause. At issue were two separate programs[52] offered in the nonpublic schools of Grand Rapids, Michigan. The programs were for nonpublic school students and were financed by the public school system, taught by teachers hired by the public school system and conducted in classrooms in the nonpublic schools which were "leased" for the program by the public school system. The Supreme Court[53] affirmed the decisions of both the trial court and the Court of Appeals for the Sixth Circuit, holding the programs unconstitutional.[54]

Under the Shared Time program, non public school students could attend classes offered during the regular school day; these courses were supplementary to the "core curriculum" required by the state. Either "remedial" or "enrichment" in nature, the subjects included mathematics, reading, art, music and physical education. The program was offered only in the nonpublic schools but the courses in the program were available in the public schools in a different form.[55] With the exception of one mathematics course, all classes were taught in elementary schools.[56]

Full time employees of the public schools taught the Shared Time Classes. They moved from classroom to classroom during the course of the school day. Approximately ten percent had previously taught in nonpublic schools; some of these teachers were assigned to the same nonpublic school where they had previously been employed. The public school system provided supplies, materials, and equipment.[57]

The Community Education Program offered classes to children and adults throughout the Grand Rapids community in schools and at other sites. This case challenged those classes taught in the nonpublic elementary schools at the conclusion of the regular school day. The courses, included arts and crafts, Spanish, gymnastics, drama and nature appreciation. Attendance was voluntary. The program preferred to hire instructors already teaching within a school in order to attract students to the courses. Therefore, most courses in the program conducted on the campus of a nonpublic school had an instructor otherwise employed full time by the same nonpublic school. The public school system paid the nonpublic school $6.00 per classroom per week for the necessary classroom space.[58]

---

[51] ___U.S. ___, 105 S.Ct. 3216 (1985).

[52] The two programs were described as the Shared Time program and the Community Education program.

[53] The opinion was authored by Justice Brennan.

[54] Justices Rehnquist and White dissented from the judgment invalidating the Community Education Program while Justices Rehnquist, White and O'Connor, joined by Chief Justice Burger, dissented from the judgment invalidating the Shared Time Program.

[55] *Grand Rapids*, 105 S.Ct. at 3218–19.

[56] "[T]he appeal involved only Shared Time classes at the elementary level, Community Education classes at the elementary level, and the remedial math Shared Time class at the secondary level." *Id.*, at 3219, n. 1.

[57] *Id.*, at 3219.

[58] *Id.*

Forty of the forty-one schools at which the programs operated were sectarian in character. Each room used in the program could not contain any religious symbol or artifact, but such symbols could be present in adjoining hallways, corridors and other facilities. While using a classroom the teacher posted a sign with the word "public school classroom."[59]

The Court addressed the constitutionality of these programs in accordance with the three part *Lemon* test.[60] Since the purpose of each program was "manifestly secular,"[61] there was no dispute that they passed the first prong of the test. Therefore, the court's analysis of the case addressed the second prong of the *Lemon* test: Whether the primary or principal effect of the challenged programs advanced or inhibited religion.

The Court's inquiry began "with a consideration of the nature of the institutions in which the programs operate."[62] Here, 40 of the 41 schools were "pervasively sectarian." The Court held that in that context, the challenged programs impermissibly advanced religion in three different ways. First, the "state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense."[63] Second, the "symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public."[64] Third, "the programs in effect subsidized the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects."[65] Therefore, these programs had the effect of advancing religion in violation of the dictates of the Establishment Clause.[66]

Aguilar v. Felton

Aguilar v. Felton,[67] a companion case to *Grand Rapids School District v. Ball*, involved the use of federal Title I[68] funds by the City of New York to pay salaries of public employees teaching in parochial schools. The programs, operated in predominantly religious parochial schools, supplemented, not supplanted, programs that would exist absent funding under Title I. Generally remedial in nature, the federally funded programs challenged in this case were similar to the programs enjoined in *Grand Rapids*. Here, however, the programs included monitors and supervisors who made periodic unannounced visits to the program

---

[59] *Id.*, at 3220.

[60] *Supra*, n. 26.

[61] *Grand Rapids*, 105 S.Ct., at 3223.

[62] *Id.*

[63] *Id.*, at 3230. This reasoning provokes the "Catch-22" description by Justice Rehnquist in Aguilar v. Felton because any monitoring to prevent indoctrination may result in "excessive entanglement." *Aguilar*, *infra*, 105 S.Ct., at 3243.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] ___ U.S. ___, 105 S.Ct. 3232 (1985).

[68] Title I of the Elementary and Secondary Education Act of 1965, Title I, 92 Stat. 2153, codified at 20 U.S.C. §2701 *et seq.*

schools to make sure that the faculty and staff did not "intentionally or unwittingly" promote the religious beliefs of the host parochial school.[69]

In what dissenting Justice Rehnquist described as a "Catch-22" paradox, the Court concluded that the supervisory system established by the city "results in the excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine."[70] Relying on the third prong of the *Lemon* test, the Court held that when a parochial school must endure the continued presence of state personnel,[71] excessive entanglement results. The rationale is that the parochial school is concerned with advancing and preserving a particular religion while state personnel are concerned with monitoring teachers and students to guard against religious infiltration.[72] The Establishment Clause not only prevents religious influence from permeating government but also prevents governmental "secularization of a creed."[73]

Justice Powell, in a separate concurring opinion, agreed that excessive entanglement rendered the program constitutionally impermissible while acknowledging that dilemma in which local "governments are placed by the interaction of the 'effects' and entanglement prongs of the *Lemon* test."[74] Unfortunately, however, political divisiveness results from entanglement; the risk is too great for "continuing political strife over the propriety" of aid to religious schools given our "limited governmental resources."[75]

The four dissenting members of the Court[76] argued as much about the continued use of the *Lemon* test (especially the excessive entanglement prong) as they did about the result. But, they also argued for a more "practical" view of the Establishment Clause. They argued essentially as follows: (1) the Title I Program at issue provided needed educational services to disadvantaged students who would not otherwise receive this kind of remedial training;[77] and (2) the program had been in operation for 19 years without one incident of subtle or overt indoctrination by teachers or divisiveness brought about by the monitoring process.[78] Justice O'Connor particularly challenged the realistic likelihood of entanglement and divisiveness and questioned the "utility of entanglement as a separate Establishment Clause standard in most cases."[79]

Witters v. Washington Department of Services for the Blind

In *Witters v. Washington Department of Services for the Blind*,[80] the Supreme Court unanimously[81] reversed a decision by the Washington Supreme Court

---

[69] *Aguilar*, 105 S.Ct., at 3236–37.

[70] *Id.*, at 3237.

[71] The result may be different in a situation involving colleges. *Id.*, at 3238.

[72] *Id.*, at 3239.

[73] *Id.*

[74] *Id.*, at 3241.

[75] *Id.*, at 3240.

[76] Chief Justice Burger and Justices White, Rehnquist and O'Connor.

[77] *Id.*, at 3241 (Burger, C.J., dissenting).

[78] *Id.*, at 3245 (O'Connor, J., dissenting).

[79] *Id.*, at 3243.

[80] ___ U.S. ___, 106 S.Ct. 748, (1986).

[81] Concurring opinions were written by Justice White, Justice O'Connor and Justice Powell, who was joined by the Chief Justice and Justice Rehnquist.

which had held that state vocational rehabilitation assistance to a blind person, studying at a Christian college for a church related career, violated the Establishment Clause. The state court, avoiding a determination on state constitutional grounds, had held that the provision of financial assistance in this case violated the second prong of the *Lemon* test because it had the primary effect of advancing religion.[82]

Writing for the Court, Justice Marshall stated that the court was "guided" used the *Lemon* test as guidance but stated that neither the "purpose" nor the "entanglement" prongs of the test were applicable. Making short work of the state's argument that the aid in this case advanced religion in violation of the second ("effect") prong of the test, the Court noted that the vocational assistance under the Washington program was paid directly to the student who decided which educational institution, sectarian or nonsectarian, public or nonpublic, he wished to attend. Nothing in the record indicated that under the Washington program any substantial portion of the financial assistance as a whole would end up benefiting religious education.[83] In sum, the Court concluded that the "link" between the state of Washington and the Christian college which the petitioner wished to attend was "highly attenuated."[84]

The Court's decision in *Witters* raises an interesting point because the Washington Supreme Court could have based its decision in this case on state, rather than federal, constitutional grounds. In reversing the state court decision, the Supreme Court reminded that state courts are "of course free to consider the applicability" of stricter state constitutional provisions.[85] Should the makeup of the present Court change and the Court become more tolerant of religious activity in public schools or of state aid to parochial schools, opponents of such practices may look for help at the state court level.[86]

Stark v. St. Cloud State University

In 1985, one district court addressed the issue of state funding in support of parochial religious schools. *Stark v. St. Cloud State University*.[87] A policy adopted by St. Cloud University allowed the placement of university students at parochial schools for their student teaching experience and paid the parochial schools public funds for their participation in the program. Applying the *Lemon* test, the court found that the policy violated the Establishment Clause and enjoined its further use.[88]

The services were being provided at the parochial schools themselves and the cumulative effect of the program, including the supervision of the student teachers, was "that a much greater entanglement with a pervasively sectarian setting

---

[82] Witters v. Commission for the Blind, 102 Wash.2d 624, 629, 689 P.2d, 53, 56 (1984).

[83] *Witters*, Slip Op., at 6–7.

[84] *Id.*, at 7.

[85] *Id.*

[86] For a thoughtful discussion of the prospect of greater "state activism" because of more restrictive provisions in state constitutions than in the First Amendment, *see*, 71 VA. L. REV. 625 (1985).

[87] 604 FSupp. 1555 (D. Minn. 1985).

[88] The court did not have the benefit of the decisions by the Supreme Court in Grand Rapids v. Ball or Aguilar v. Felton but relied on the circuit court decisions in each case.

occurs than is permissible under the Court's decisions in this area."[89] In *Stark*, as in *Aguilar*, any efforts to prevent the "possibility of intentional or inadvertent fostering of religion" would have resulted in excessive entanglement.[90]

Although not expressly articulating its analysis in terms of the first part of the *Lemon* three part test, the court also found that the policy was not adopted with a secular purpose. The court noted that the policy was initiated at the request of the parochial schools, and that given the university's inability to meet the student teacher needs of all *public* school districts the diversion of resources to religious institutions was not for secular purposes.[91]

EQUAL ACCESS

In this section, the claimed statutory and constitutional rights of students and others to access school facilities and grounds for religious activities will be discussed.

Statutory Access

The Equal Access Act[92] provides that a public secondary school which receives federal financial assistance and which has in existence a "limited open forum" may not deny equal access to students wanting to conduct a meeting within that limited open forum because of the "religious, political, philosophical, or other content of the speech" at any such meeting.[93] Two district courts have addressed Equal Access Act claims; however, only one of these cases dealt with religion.

Mergens v. Board of Education of Westside Community Schools

Mergens v. Board of Education of Westside Community Schools,[94] involved a request for preliminary injunctive relief by students whose request that their Christian club be allowed to meet at the defendant's high school had been denied. The plaintiff students sought equitable relief (1) under the Equal Access Act and (2) on the basis of an independent constitutional right of access under the First Amendment clauses guaranteeing freedom of speech, association and exercise of religion. The court denied the plaintiff's requested relief.

Since these issues were being addressed at the preliminary injunction stage rather than upon a full trial on the merits, the court analyzed the issues in terms of the four factors to be considered in deciding whether to grant or deny an injunction.[95] The court concluded that "serious questions have been raised"

---

[89] *Stark*, 604 FSupp., at 1563.

[90] *Id.*

[91] *Id.*, at 1564–65.

[92] 20 U.S.C. §4071–4072.

[93] 20 U.S.C. §4071(a).

[94] C.V. 85–0–426 (D. Neb., May 23, 1985).

[95] (1) The threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. Data Phase Systems, Inc. v. CL Systems, Inc., 640 F2d 109, 114 (8th Cir. 1981).

about the constitutionality of the Act sufficient, given the other circumstances of this case, to deny the injunction.[96]

The court recognized that the Supreme Court, in *Widmar v. Vincent*,[97] had found a constitutional right of equal access for students at the university level given the open forum that had been created by the university; however, other courts have distinguished state conduct effecting students at the elementary and secondary level from state action towards students at the university level. The court observed that different courts of appeal in *Bender v. Williamsport*[98], *Nartowicz v. Clayton County School District*[99], *Lubbock C.L.U. v. Lubbock Independent School District*[100], and *Brandon v. Board of Education*[101] considered the equal access concept (but not the Equal Access Act) and found it violative of the Establishment Clause. Therefore, given the "potential constitutional infirmities of the Equal Access Act" as well as any court imposed equal access policy, plaintiffs did not establish the likelihood of prevailing and the request for preliminary injunctive relief was denied.

Student Coalition for Peace v. Lower Merion School District

In *Student Coalition for Peace v. Lower Merion School District*,[102] the court wrote an opinion reconsidering its previous denial of a request for injunctive relief after the Equal Access Act was brought to the court's attention.[103] The case did not involve religious activities; rather, the student organization bringing the suit sought equal access for an anti-nuclear war rally and peace exposition. The court, on reconsideration, again denied the injunction.

The court construed the plaintiffs' request as wanting to extend and expand the limited public forum. The Court then held that a school district may deny access to its facilities to a non-curriculum related student group which intends to invite nonstudents and the general public to its meeting. This may occur where the district does not have a policy or practice of indiscriminately permitting the use of its facilities by other non-curriculum related student groups desiring to invite nonstudents and the general public.[104]

Constitutional Equal Access Policy

The courts have considered the existence *vel non* of a constitutional right of equal access for religious activities since *Widmar v. Vincent*.[105] While the Supreme

---

[96] That is, the court determined that plaintiffs had not established that they were likely to prevail on the merits. The court also found for the defendents with respect to the irreparable harm and the balancing of equity factors in the four part test described in *Data Phase*, *id.*

[97] 454 U.S. 263 (1981).

[98] 741 E2d 538 (3rd Cir. 1984), *cert. granted*, 53 U.S.L.W. 3585 (1985).

[99] 736 E2d 646 (11th Cir. 1984).

[100] 669 E2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1159 (1983).

[101] 635 E2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

[102] No. 84–1017 (E.D. Penn., January 31, 1985).

[103] The previous opinion of the court is reported at 596 ESupp. 169 (E.D. Pa. 1984).

[104] An additional point of interest in the case is that the court, without comment or discussion, read the Act's provision that it is unlawful "for any public secondary *school* which receives federal financial assistance" (emphasis added) to mean a public *school district*. It does not appear that an issue was made of that point.

[105] 454 U.S. 263 (1981).

Court in *Widmar* recognized equal access at the university level, the circuit courts have uniformly rejected the concept in the public elementary and secondary school context.[106] However, in *Bender v. Williamsport Area School District*,[107] the Supreme Court avoided deciding the First Amendment issue and instead ruled that the appellant lacked standing to bring the suit. Hence the court of appeals had had no jurisdiction to hear the case. The effect of this decision was to reinstate the district court's judgment which allowed the student religious group to meet during the extra-curricular activity period. The four dissenting justices in *Bender* decided that: 1) the appellant did have standing; and 2) *Widmar v. Vincent* controls the merits of the case. Chief Justice Burger, in his dissent, reasoned that the student's activities were conducted by students and not by the state. Hence, their right to meet as a group should not be prohibited by the Establishment Clause. Justice Powell, in his dissenting opinion, said that *Widmar v. Vincent* controls this case on the merits. He reasoned that "in this age of massive media information,"[108] the difference in age between college and high school students does not warrant a departure from *Widmar*.

Bell v. Little Axe Independent School District No. 70

The Tenth Circuit Court of Appeals considered the constitutionality of a school district's equal access policy in *Bell v. Little Axe Independent School District No. 70*.[109] In this case, parents opposed to religious activities at school actually recovered compensatory damages from the defendant school officials because of the rather extreme circumstances. For some time, the school district had allowed, and even sponsored, a number of religious activities, including prayer, during the school day. After the plaintiff parents initiated their lawsuit to stop those activities, their children were labeled as "devil-worshipers", one of the children's hair was pulled by a school employee, two children of the plaintiffs were denied recognition at a sports banquet, and the home of one of the plaintiffs was destroyed by a fire of suspicious origin.[110] The court considered whether an equal access policy adopted by the school district, after the filing of the lawsuit, legitimized the religious practices and activities conducted at school.[111]

Applying the *Lemon* test,[112] the court held that the school district's actions clearly violated the Establishment Clause.[113] The court further held that the equal access policy adopted by the school districts was unconstitutional[114] insofar as it permitted "concerted religious activity on the school grounds during the school

---

[106] *See, supra*, nn. 98–101.

[107] Bender v. Williamsport Area School District, 106 S.Ct. 1326 (1986).

[108] *Id.* at 1339.

[109] *Supra*, n. 48; 766 F.2d 1391 (10th Cir. 1985).

[110] *Id.*, at 1397.

[111] *Id.* at 1402.

[112] *Id.*

[113] *Id.*, at 1407.

[114] The court expressly stated that its conclusion was not affected by the recently enacted Equal Access Act. While observing that the constitutionality of the Act had not been determined nor was it before the court, the court observed that the presence of one secondary grade, ninth grade, did not make the Little Axe School a secondary school thereby invoking the Act. *Id.*, n. 16.

day."[115] Several factors were paramount in the court's analysis. First, as stated before, the facts were extreme. Second, the school district's blatant disregard of an earlier injunctive order convinced the court that the district's "preeminent purpose" was religious.[116] Third, the students involved here were young, attending grades kindergarten through nine.[117] Finally, the court reasoned that the religious activity affecting such young children could not be compared to activity in a high school or university level context.[118]

The court also held that the plaintiffs were "entitled to recover compensatory damages for the loss of the inherent value of their rights under the Establishment Clause," even if they cannot prove "consequential injury."[119] The case was remanded to the district court for the consideration of punitive damages.[120]

May v. Evansville-Vanderburgh School Corp

Another case dealing with equal access, *May v. Evansville-Vanderburgh School Corp.*,[121] was brought by a teacher's aide whom, along with other employees, the school district prohibited from conducting voluntary weekly meetings at the elementary school campus for the purpose of prayer, religious devotions and religious speech.[122] After finding that the school district had not created a public forum,[123] the court concluded that there was no violation of the aide's free speech rights.[124]

The court also considered the question of whether the Establishment Clause provides a compelling state interest sufficient to justify any asserted infringment of the constitutional free exercise rights of the plaintiff. Applying the *Lemon* test, the court found that the school district's policy of refusing to allow such meetings had a secular purpose, that it did not have the primary effect of advancement of religion, and that excessive entanglement with religion was avoided.[125] Therefore, the court granted the school district's motion for summary judgment.

Breen v. Runkel

In *Breen v. Runkel*[126] the court considered claims by teachers, students and parents of those students that the state superintendent of public instruction

---

[115] *Id.*, at 1407.

[116] *Id.*, at 1403.

[117] *Id.*, at 1401, n. 7.

[118] *Id.*, at 1404.

[119] *Id.*, at 1408. *But see, Memphis v. Stachman*, 54 U.S.L.W. 4771 (no. 85–410) (U.S. June 25, 1986).

[120] *Id.*, at 1413.

[121] 615 FSupp. 761 (S.D. Ind. 1985).

[122] *Id.*, at 763.

[123] "If other teacher groups were permitted to meet on a variety of religious and nonreligious subjects in the kind of formalized way Mrs. May's [Plaintiff's] group met, there might be an argument that a public forum, or at least a limited public forum, existed in this case and that the exclusion of Mrs. May's [Plaintiff's] group was some denial of constitutional rights." *Id.*, at 764.

[124] *Id.*, at 765.

[125] *Id.*, at 765–66.

[126] *Supra.*, n. 44; 614 FSupp. 355 (W.D. Mich. 1985).

violated their free exercise and free speech rights. The superintendent allegedly ordered a local school board to take action to stop voluntary student Bible study groups from meeting during the class day. Noting the absence of any Supreme Court precedent in this area, the court decided that evidence would have to be received before a decision could be made and, therefore, refused to dismiss the claims on the basis of the pleadings.[127]

HOME SCHOOL AND COMPULSORY ATTENDANCE

In recent years, litigation involving challenges to the compulsory attendance laws of the various states by person desiring to educate their children at home for religious (and other) reasons have become more frequent.

Mazanec v. North Judson-San Pierce School Corp

Mazanec v. North Judson-San Pierce School Corp.,[128] addressed the question of whether the district court properly abstained in plaintiffs' challenge to Indiana's compulsory attendance law. The plaintiffs, Jehovah's Witnesses, claimed that the state law: (1) was unconstitutionally vague and (2) infringed upon their religious freedom. Two months after the trial ended, the district court decided to abstain from deciding the case and the plaintiffs appealed. The court of appeals reversed and remanded with instructions to issue a prompt decision resolving the merits.[129] The opinion dealt primarily with judicial abstention and the procedural rules relating to that doctrine. However, the court of appeals made some observations relevant to the issue of religion and home schooling.

The court distinguished the situation in *Mazanec* from that of *Wisconsin v. Yoder*,[130] in which the Supreme Court held that Wisconsin's compulsory attendance law violated the religious rights of the Amish plaintiffs. In *Yoder*, the Amish did not want their children to receive formal education after the eighth grade because they wanted their teenagers to work in the fields. Here, the Jehovah's Witness plaintiffs simply wanted their children to receive an academic education at home rather than in the public schools.[131] The court also saw little likelihood that Indiana's statute would be held unconstitutionally vague in this case merely because it required that home instruction be "equivalent to that given in the public schools."[132]

On remand from the Seventh Circuit's decision, the district court held that the instruction provided at home was "equivalent to that given in the public schools" and therefore plaintiffs did not violate of the Indiana law.[133] Having reached that conclusion, the court declined to address the constitutional challenge to the Indiana state law. The court also found that the superintendent of the school

---

[127] *Id.*, at 360–361.

[128] 763 F.2d 845 (7th Cir. 1985).

[129] *Id.*, at 849.

[130] 406 U.S. 205 (1972).

[131] *Id.*, *Mazanec*, 763 F.2d, at 847.

[132] *Id.*

[133] Mazanec v. North Judson-San Pierre School Corp., 614 FSupp. 1152, 1160 (N.D. Ind. 1985) The district court was impressed with expert testimony concerning the quality of education made possible in the home school environment through the use of the Greenhouse curriculum developed at the Santa Fe Community School in New Mexico. *Id.*, at 1159.

district was entitled to immunity from liability under *Harlow v. Fitzgerald*[134] for his part in complying with the compulsory attendance laws.[135]

Ellis v. O'Hara

In a similar case challenging the Missouri compulsory education statute, the court in *Ellis v. O'Hara*[136] held that the statute, which allowed parents to provide their children with an education at home if the instruction was "substantially equivalent" to that provided in the public schools, was unconstitutionally vague.[137] Because of this holding, the court did not determine whether it was unconstitutionally overboard so as to infringe upon the "plaintiffs' First Amendment right to direct the religious upbringing of their children."[138]

Johnson v. Charles City Community Schools Board of Education

In *Johnson v. Charles City Community Schools Board of Education*[139] the Supreme Court of Iowa dealt with a challenge to that state's compulsory attendance law as it affected the operation of a private church school. In this case the pastor and several members of a Fundamentalist Baptist Church organized a school to be an integral part of the church; the religious beliefs of the church permeated the educational environment and the curriculum of the school. The pastor, acting only as an instrument of God's will, selected the teachers for the church school. Therefore, the church asserted that the teachers were selected by God.[140] Plaintiffs argued that because the church school is an essential religious function of the church, the state has no authority to regulate or control the church school and, thus, has no authority to inquire about the teaching staff or curriculum at the church school.

Rejecting these claims, the court held that while "First Amendment considerations limit the extent to which a state can intrude into the educational affairs of a private religious school" the state nevertheless has clear authority, "even a duty," to see that certain minimum educational standards are met.[141] The court also upheld a requirement that teachers in an alternative school providing "equivalent instruction"[142] must be certified.[143] It rejected an argument, however, that annual comparative testing of the student's academic progress by the state, without more,

---

[134] 457 U.S. 800 (1982).

[135] *Mazanec*, 614 FSupp., at 1158–59.

[136] 612 FSupp. 379 (E.D. Mo. 1985). A prior decision in this case concerning class action certification is reported at 105 F.R.D. 556 (E.D. Mo. 1985).

[137] *Ellis*, 612 FSupp., at 381. "Nowhere is substantially equivalent defined, however, or are regulations promulgated which clarify its meaning. Nor have the Missouri courts furnished edification regarding the meaning of the statute. . . . Of even greater significance, however, is that the Legislature has not provided minimal guidelines for law enforcement." *Id.*

[138] *Id.*, at 382.

[139] 368 N.W.2d 74 (Iowa 1985) *cert. denied sub. nom.* Pruessner v. Benton, 54 U.S.L.W. 3409, 3411 (Dec. 16, 1985).

[140] *Id.*, at 76–77.

[141] *Id.*, at 78, 79.

[142] Plaintiffs did not challenge the statute on appeal on grounds of vagueness. *Id.*, at 79–80.

[143] *Id.*, at 80.

would satisfy the necessary interest of the state while minimizing its intrusion into the religious activities of the plaintiffs.[144]

State v. Neustrom

In *State v. Neustrom*[145] the Supreme Court of Minnesota held that a compulsory attendance law requiring instruction by teachers, whose "qualifications are essentially equivalent" to the minimum standards for public school teachers," is unconstitutionally vague. The decision came on an appeal by a mother convicted of violating the compulsory attendance law. The court expressly noted that criminal liability was at stake and that in a civil proceeding the result might be different.[146]

ACCOMMODATION OF EMPLOYEES' RELIGIOUS BELIEFS

Thornton v. Caldor

About three weeks after the Supreme Court decided *Wallace v. Jaffree*, the Court announced its decision in *Thornton v. Caldor*.[147] Although this case did not arise in the context of schools or education, its application may affect statutes or policies governing the employer/employee relationship in the schools. The Supreme Court[148] held that a statute which provided "Sabbath observers with an absolute and unqualified right not to work on their Sabbath, violates the Establishment Clause of the First Amendment."[149]

The statute,[150] as interpreted by the state courts, gave an employee the absolute unilateral right to declare his own Sabbath and to refuse to work on that day. The statute required no accommodation or compromise on the part of the employee, while the employer and other employees had to conform their conduct to the particular religious practices of the employee. The Court, applying the *Lemon* test,[151] concluded that the statute had "a primary effect that impermissibly advances a particular religious practice."[152] Justice O'Connor wrote a separate concurring opinion analyzing the issues in terms of the "endorsement" test she has proposed and to express the belief that the Court's opinion should

---

[144] "We agree that mere testing would be wholly inadequate to protect the state's rightful interest. A test looks only backward". *Id.*, at 81.

[145] 371 N.W.2d 525 (Minn. 1985).

[146] *Id.*, at 533.

[147] ___ U.S. ___, 105 S.Ct. 2914 (1985).

[148] The opinion was delivered by Chief Justice Burger; only Justice Rehnquist dissented.

[149] *Thornton*, 105 S.Ct., at 2918.

[150] Conn. Gen. Stat. § 53–303e(b) (Supp. 1962–1984), provides: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal."

[151] Chief Justice Burger stated: "In setting the appropriate boundaries in Establishment Clause cases the Court has frequently relied on our holding in *Lemon*, *supra*, for guidance, and we do so here." *Thornton*, 105 S.Ct., at 2917.

[152] *Id.*, at 2918.

not be read as suggesting that the religious accommodation provisions of Title VII[153] are similarly invalid.[154]

Philbrook v. Ansonia Board of Education

The case of *Philbrook v. Ansonia Board of Ed.*,[155] directly involved the religious accommodation sections of Title VII. Plaintiff Philbrook, a typing and business teacher at the high school level, belonged to the Worldwide Church of God. Some of the holy days observed by this church fell during the school week, a situation which caused plaintiff to miss approximately six school days each year. The school district had different leave policies throughout the relevant time period but, as a general rule, provided three paid leave days for religious holidays for all teachers and allowed plaintiff Philbrook (and others) to take unpaid leave for any additional holy days. Claiming that this practice did not sufficiently accommodate his religious beliefs, Mr. Philbrook sued for injunctive relief and backpay.[156]

The trial court found for the school district because Mr. Philbrook had not been placed in the position of either violating his religion's beliefs or losing his job; he received three paid leave days and additional leave days without pay. The court of appeals reversed and remanded for retrial, holding that where the employer and the employee each propose a reasonable accommodation of the employee's religious beliefs, Title VII requires the employer to accept "the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business."[157]

Under Title VII, an employer may not discriminate against an employee on the basis of the employee's religious beliefs unless the employer shows that it is unable to reasonably accommodate the religious practices of the employee without "undue hardship."[158] In order to make a prima facie case, the employee must prove that he has a bona fide religious belief that conflicts with an employment requirement, that he informed the employer of his beliefs and that he was disciplined for failure to comply with the conflicting employment requirement.[159] If a prima facie case is made, the burden shifts to the employer to show that it cannot reasonably accommodate the employee without undue hardship on the conduct of the employer's business.[160]

Here, the plaintiff proposed that he be allowed to pay the cost of the substitute ($30.00/day) rather than lose his full day's pay ($130.00) or that he be allowed to take personal leave days for religious holy days. The superintendent testified that this proposal would result in undue hardship because of the difficulty in finding certified substitutes, the lowered quality of student learning with a substitute,

---

[153] 42 U.S.C. §§ 2000e(j) and 2000e – 2(a)(1).

[154] 105 S.Ct. at 2918-2919.

[155] 757 F2d 476 (2d Cir. 1985) *cert. granted*, 54 U.S.L.W. 3484 (Jan. 21, 1986).

[156] He sought pay for days he had been absent to observe his religion's holy days for which he had not been paid.

[157] *Philbrook*, 757 F2d, at 484.

[158] 48 U.S.C. [2000e(j).

[159] *Philbrook*, 757 F2d, at 481 (*citing* Turpen v. Missouri-Kansas-Texas Railroad Co., 736 F2d 1022, 1026 (5th Cir. 1984)).

[160] *Id.*

difficulty of substitutes in maintaining discipline and damage to classroom equipment when substitutes teach.[161] The court held that the issue before it was whether the proposals for accommodation made by the employee are reasonable and may be accomplished without undue costs. The court remanded the case for the district court to decide if accepting plaintiff Philbrook's proposals would cause undue hardship, but noted that on the record before it, there was no such hardship.

There appears to be some tension between this decision and *Thornton v. Caldor*[162] which may be resolved when the Supreme Court hears and issues its opinion in the *Arsonia* case.

CREATIONISM

Aguillard v. Edwards

In what the court characterized as the latest battle in the war begun with the 1927 *Scopes* trial which pitted Clarence Darrow against William Jennings Bryan, the Fifth Circuit Court of Appeals addressed the constitutionality of a Louisiana statute requiring the teaching of creation science in public schools whenever evolution science is taught. *Aguillard v. Edwards*.[163] The law does not require any instruction relative to the subject of the origin of mankind, but if the school teaches evolution or creation, it must also teach the other theory and give a balanced treatment to both.[164] Notwithstanding the state's claim that the challenged statute promotes academic freedom, thereby serving a legitimate secular interest, the circuit court affirmed the district court's summary judgment declaring the act unconstitutional.

The court of appeals recognized the Supreme Court's unwillingness to accept the *Lemon* test as the iron clad analytical vehicle, but nevertheless concluded that the *Lemon* test was viable and appropriate.[165] Here, the court found it necessary to consider only the first part of the test—whether the statute has a secular legislative purpose. Concluding that the theory of creation is a religious belief, the court held that the statute's "intended effect is to discredit evolution by counter balancing its teaching at every turn with the teaching of creationism, a religious belief. The statute therefore is a law respecting a particular religious belief."[166] Therefore, the act failed to pass the first part of the *Lemon* test and was held unconstitutional.

OFFENSIVE CURRICULUM MATERIALS

Grove v. Mead School District No. 354

The case of *Grove v. Mead School District No. 354*[167] concerned a claim by "fundamentalist Christian" parents of a high school sophomore public school

---

[161] *Id.*, at 480, n. 3, 486.

[162] As the dissent point out, the court's opinion in this case appears to conflict with the decision of the Tenth Circuit in Pinsker v. Joint District No. 28J, 735 F2d 388 (10th Cir. 1984). There, the court held that a school board made reasonable accommodation by permitting a teacher to take unpaid leave for religious observance if employee desired more than the two paid religious leave days provided by policy.

[163] 765 F2d 1251 (5th Cir. 1985), *probable juris. noted*, 54 U.S.L.W. 3729 (May 5, 1986).

[164] *Id.*, at 1253.

[165] *Id.*, at 1255, n. 8.

[166] *Id.*, at 1257.

[167] 753 F2d 1528 (9th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3224 (October 7, 1985).

student who had objected to assigned curriculum materials. The student, and her parents, found *The Learning Tree*, by Gordon Parks, offensive to their religious beliefs. Responding to those objections, the student's teacher assigned the student a different book and gave her permission to leave class during discussion of the "offensive material." In spite of this offered accommodation, the parents protested to the school board and requested that the book be removed from the sophomore curriculum. The school board denied the request and plaintiffs sued for damages and injunctive relief. The court held that the free exercise rights of the student and her parents had not been infringed upon and that the use of *The Learning Tree* in the English curriculum did not violate the Establishment Clause.[168]

The court found no constitutional violation after determining that the burden on the student's "free exercise" rights was minimal. The school district had reasonably accommodated the plaintiffs' religious beliefs. Complete satisfaction for all religious groups is not required by the Constitution, the court noted; the elimination of all material objectionable to any religious body would "leave public education in shreds."[169] The court also made short shrift of the parent's Establishment Clause claims. Applying the *Lemon* test, the court rejected the parent's claim that use of *The Learning Tree* had the primary effect of inhibiting their religion, Fundamentalist Christianity, and advancing the religion of secular humanism. The court observed that the central theme of the book is life, comment on religion is a very minor part, and the primary effect of the book is secular.

INVOCATIONS AND BENEDICTIONS

Two recent cases from the federal district courts concerning the practice of providing an invocation and benediction at high school graduation ceremonies will be discussed in this section. The different results in these two cases demonstrate the intensely factual nature of any analysis of a challenged practice.

The two cases, *Graham v. Central Community School District of Decatur County*[170] and *Stein v. Plainwell Community School*,[171] include religious invocation and benediction scheduled to be part of a high school graduation ceremony. In each case, participation in the ceremony was voluntary; students did not need to attend to receive a diploma. Other than these common factors, the two cases differed.

Graham v. Central

In *Graham* the school board assumed the responsibility for organizing the graduation exercises and each year called upon a group of local ministers to select from among themselves a minister to conduct the invocation and benediction. The minister had complete control over the content of this part of the ceremony. The plaintiffs had objected on prior occasions to various religious practices employed in the school district (on one occasion a teacher had conducted a Christian prayer in class and, in the past, Gideon bibles had been distributed to students). The plaintiff parents complained to the school board

---

[168] *Id.*, at 1534.

[169] *Id.*, at 1533, *quoting*, Florey v. Sioux Falls School District 49–5, 619 F2d 1311, 1318 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).

[170] 608 FSupp. 531 (S.D. Iowa 1985).

[171] 610 FSupp. 43 (W.D. Mich. 1985).

not only about the invocation and benediction but also about conducting a religious baccalaureate ceremony as a part of the graduation exercises. In response, the school board agreed to discontinue the baccalaureate but refused to abandon the invocation and benediction as a part of the ceremony.[172]

Applying the *Lemon* test[173] to the evidence presented in the case,[174] the court held the practice unconstitutional, stating that the religious activities served a Christian religious purpose since prayer is "inherently religious."[175] Further, the practice had as its primary effect the advancement of the Christian religion.[176] The court did not address the third part of the *Lemon* test concerning entanglement because it considered its resolution of the first two parts dispositive. The school district was enjoined from including a religious invocation and benediction as a part of its graduating ceremonies.[177]

Stein v. Plainwell Community Schools

In *Stein v. Plainwell Community Schools*[178] on the other hand, the court refused to enjoin two different school districts from including an invocation and benediction in their graduation ceremonies. In one school district, two students selected from a group of honor students offered the invocation and benediction at the graduation ceremony. In the other school district involved in the case, the graduating seniors organized and developed the content of the graduation ceremony and selected a local minister to deliver the invocation and benediction.[179] The court, concluding that these practices were not unconstitutional under the *Lemon* test, refused to grant injunctive relief.[180]

The court analyzed the purpose of the sponsoring school districts, rather than the purpose of the person delivering the invocation or benediction, and found a valid secular purpose.[181] There was no evidence that the district was influenced by any secret purpose of promoting religion.[182] Applying the second prong of the *Lemon* test, the court also concluded that the practice did not have as its primary effect the advancement of religion for these reasons: (1) the graduation ceremony was not a mandatory part of the curriculum, (2) speakers other than school employees delivered the religious address, (3) there was no danger of daily indoctrination, (4) the audience at the graduation ceremony consisted of

---

[172] 608 FSupp., at 532–533.

[173] The court noted some tension among the justices of the Supreme Court about the vitality of the *Lemon* test but decided that the three part test must be used. *Id.*, at 535.

[174] The plaintiffs presented three expert witness clergymen who testified that the practice had a religious purpose which was offensive to non-Christians. The defendants presented the testimony of a school board member and the superintendent who testified that the practice was supported by tradition and the overwhelming majority of patrons of the district. *Id.*, at 534.

[175] *Id.*, at 535.

[176] *Id.*, at 536.

[177] *Id.*, at 537.

[178] *Supra*, 610 FSupp. 43.

[179] *Id.*, at 54.

[180] *Id.*, at 46, 50.

[181] The court recognized that prayer in this context had a dual nature, partly religious and partly ceremonial. *Id.*, at 47.

[182] *Id.*, at 48.

adults and graduating seniors who are beyond the age at which they are impressionable, (5) graduation was not a part of the educational program of the school and (6) the speakers did not intend to use these services as an opportunity to proselytize.[183] The court also found that this once-a-year ceremony did not allow entanglement in violation of the third part of the test. The request for injunction was denied.

[183] 610 FSupp. at 49–50.

Application of the Fair Labor Standards Act To School Boards

by: Ronald J. James

INTRODUCTION

The Fair Labor Standards Act of 1938[1] (FLSA) is the federal minimum wage and overtime pay law. Generally, employees covered by the statute must be paid the federal minimum wage, which is currently $3.35 per hour. Most employees covered by the FLSA overtime requirements must be paid one and one-half times their regular hourly rate of pay for hours worked in excess of forty in an established seven day work week. The law is enforced by the Wage and Hour Division of the Department of Labor, and individuals may also sue to enforce their rights under the FLSA absent government action.[2] In 1966 Congress made the FLSA applicable to public schools. In 1974 Congress amended the FLSA to cover any public agency. In 1976 the Supreme Court found that the law's application to "traditional" functions of states and their political subdivisions, such as education, was unconstitutional. *National League of Cities v. Usery*.[3] In February, 1985 the Supreme Court overruled its decision in *National League of Cities* and upheld the constitutionality of the FLSA's application to state and local government employers. *Garcia v. San Antonio Metropolitan Transit Authority*.[4]

In reaction to the *Garcia* decision, Congress amended the FLSA in November 1985 to reduce the impact of the FLSA on public employers. The major features of the Fair Labor Standards Amendments of 1985 (1985 Amendments) are the elimination of federal overtime liability for public employers until April 15, 1986, and authorization of the use of compensatory time off as payment for overtime thereafter.

EFFECTIVE DATES AND COVERAGE

Minimum Wage

The *Garcia* decision imposes the FLSA minimum wage requirement on public school employees; this requirement is not affected by the 1985 Amendments.

---

[1] 29 U.S.C. § 301 *et seq.*

[2] 29 U.S.S. § 216.

[3] 426 U.S. 833 (1976).

[4] ___ U.S. ___, 105 S.Ct. 1005 (1985).

The Wage and Hour Division is expected to enforce the minimum wage requirement retroactive to April 15, 1985, the date that the *Garcia* decision became final.

Overtime

The 1985 Amendments delay the effective date of the federal overtime requirements for public school employees until April 15, 1986[5]. Cash payment for overtime hours worked from April 15, 1986 until August 1, 1986 may be deferred until August 1, 1986.[6] The 1985 Amendments waived FLSA liability that accrued between the *Garcia* decision and the enactment of the amendments,[7] but an employer who voluntarily paid overtime after the *Garcia* decision cannot recoup those payments by any means.[8] An employer also cannot discriminate against any employee with respect to wages or employment conditions because the employee asserted an overtime claim after the *Garcia* decision.[9]

EXEMPTIONS

There are a number of exemptions from the overtime and/or minimum wage requirements of the Fair Labor Standards Act. Most important are occupational exemptions for "executive," "administrative" and "professional" employees.[10] Individuals who qualify for these exemptions are not subject to the minimum wage or overtime requirements of the FLSA,[11] though they are subject to certain record keeping requirements. Teachers and academic administrators are expressly included within the occupational exemptions,[12] but qualification for the exemption depends upon meeting specific regulatory tests based on job duties, not titles.[13] Employees other than academic administrators and teachers may also be covered by one of these occupational exemptions. Other relevant FLSA exemptions include partial exemptions, which may for example affect overtime obligations but not minimum wage requirements.

Executive Employee Exemption

- **The "Long Test"**

Employees are exempt from minimum wage and overtime requirements as executive employees if they meet *all* the following requirements.[14]

a. *Primary duty must be management of the enterprise or a recognized department*; and

b. *Must regularly direct work of at least two employees*; and

---

[5] 1985 Amendments Section 2(c).

[6] *Id.*

[7] *Id.*

[8] 1985 Amendments Section 8 and Joint Explanatory Statement of the Committee of Conference.

[9] *Id.*

[10] 29 U.S.C. § 213 (a)(1).

[11] *Id.*

[12] 29 U.S.C. § 213.

[13] 29 C.F.R. Part 541.

[14] 29 C.F.R. § 541.1.

c. Must have authority to hire or fire or effectively recommend hiring or firing and promotion of other employees; and
d. Must regularly exercise discretionary power; and
e. Must not devote more than 20 percent of time to activities unrelated to (a) through (d);[15] and
f. Receive a salary of $155 per week.[16]

- **The "Short" Test**

If the employee receives a salary of at least $250 per week, the employee is exempt if he meets tests 1(a) and 1(b) above.[17]

- **Definitions**

a. "Primary duty" means that roughly over 50% of the employee's time is spent in managerial duties. Even if this test is not met, other factors may be considered such as relative freedom from supervision, and how frequently discretion is exercised.[18]
b. "Management" includes, in part, such duties as directing the work of other employees; interviewing, selecting, training, and evaluating employees; handling grievances, complaints, and imposing discipline; planning the work and determining the techniques used; and assigning or apportioning work.[19]
c. "Department" or "subdivision" means a unit with a permanent status and function.[20]
d. "Two or more other employees" means at least the equivalent of two full-time employees. Supervision of one full-time and two half-time employees meets the test.[21]

- **Application To School Boards**

Positions such as superintendents and principals would fall within this exemption, but such positions are already expressly exempt as academic administrators (*see* Administrative Employee Exemption). Positions which warrant careful scrutiny under this exemption are non-academic "executive" positions. "Working supervisors" such as cafeteria managers may perform managerial duties and supervise two employees, but if most of their time is spent performing non-managerial work, the exemption will not apply even under the high salary "short" test.[22]

---

[15] Certain exceptions may apply, see 29 C.F.R. § 541.1(e).

[16] 29 C.F.R. § 541.1.

[17] 29 C.F.R. § 541.1.

[18] 29 C.F.R. §§ 541.103, 541.108–111.

[19] 29 C.F.R. § 541.102.

[20] 29 C.F.R. § 541.104.

[21] 29 C.F.R. § 541.105.

[22] 29 C.F.R. § 541.115.

Administrative Employee Exemption

- **The "Long" Test**

Employees are exempt administrative employees if they meet all of the following requirements:

a. Primary duty must consist of either (i) performing office or non-manual work directly related to management policies or general business operations; or (ii) *performing administrative functions for an educational institution, and in work directly related to academic instruction*; and
b. *Must customarily and regularly exercise discretion and independent judgment*; and
c. Must (i) regularly and directly assist an exempt executive or administrator; or (ii) perform specialized or technical work, under only general supervision, which requires special training, experience or knowledge; or (iii) execute special assignments and tasks under only general supervision; and
d. Spend no more than 20% of time on non-exempt work; and
e. Receive a salary of at least $155.00 per week.

- **The "Short" Test**

If the employee earns a salary of at least $250 per week, the test must only satisfy requirements 1(a) and 1(b) above.

- **Academic Administration**

"Academic administrators" include the superintendent or other head of the school system. Also included are those of his assistants whose duties primarily concern the administration of curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program. Such positions include the principal and vice principals responsible for operation of the schools. Also included are heads of academic departments.[23] The duties must be related to education, and would not include jobs relating to such areas as building management and maintenance, or the health of students, such as psychologists or lunch room managers.[24] (Such positions may nevertheless be examined under the *other* provisions of the administrative employee exemption or requirements of the other occupational exemptions.)

- **Work Related to Management**

Work "directly related to management policies or general business operations" means the work must be of substantial importance to the management or operations of the employer. It is not limited to those who formulate policy, but includes those who execute it, or whose assignments affect operations substantially even though the tasks relate to a specific aspect of the operation.[25] Secretaries

[23] 29 C.F.R. § 541.201(c).

[24] 29 C.F.R. § 541.202(e).

[25] 29 C.F.R. § 541.205.

and bookkeepers performing routine clerical duties are *not* within this exemption.[26]

- **Discretion**

The "discretion and independent judgment" requirement means the employee must make choices regarding possible courses of conduct or action. The employee must have the authority to make an independent choice free from immediate direction or supervision, and with respect to matters of significance. Such discretion must be called upon regularly in the day to day performance of duties.[27]

Professional Employee Exemptions

- **The "Long" Test**

Employees are exempt professional employees if they meet the following requirements:[28]

a. Primary duty must consist of work requiring advanced knowledge of a type acquired through specialized study; *or* creative work in a field of artistic endeavor; *or*
Teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and employed in this activity as a teacher in the school system; and
b. The work requires the consistent exercise of discretion and judgment; and
c. The work is predominantly intellectual and varied in nature and involving output which cannot be measured on the basis of standardized units of time; and
d. The employee must devote 80% of hours worked each week in those activities; and
e. Must receive a weekly salary of at least $170 per week. (Persons employed and engaged as teachers *are exempt from this minimum salary requirement.*)[29]

- **The "Short" Test**

If the salary is at least $250 per week, the exemption is met if professional or teaching duties requiring consistent discretion, judgment or imagination are the "primary duty" (roughly involve over one-half of the employee's time.)

- **Employed As A Teacher**

a. Teaching is defined as including teaching, tutoring, instructing, and lecturing in the activity of imparting knowledge. Faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or as advisers in drama, forensics, etc., are engaged in teaching.
b. For persons employed in public schools, an elementary or secondary teacher's certificate is a prerequisite for employment as a teacher. Possession

[26] *Id.*

[27] 29 C.F.R. § 541.207.

[28] 29 C.F.R. § 541.3.

[29] 29 C.F.R. § 541.314.

of a teacher's certificate is therefore used as a uniform means of identifying the individuals contemplated as being within the scope of the teacher exemption for public schools.[30]

Partial Exemptions

- **Occasional Part-Time Jobs**

The 1985 Amendments to the FLSA have established a partial exemption from overtime obligations. If a non-exempt public employee works for the same employer in a different type of job from his regular duty on an occasional or sporadic basis at the employee's option, the part-time hours will not be counted as hours worked in determining overtime obligations.[31] Thus, for example, a custodian who occasionally drives a bus on a field trip or takes tickets at an athletic event will not have such hours included in any overtime determination.

- **Limited Student Exemptions**

Students who are in bona fide vocational programs are subject to a partial exemption from the minimum wage requirement. Such students may be paid 75% of the minimum wage. To use the exemption, the employer must first obtain a certificate from the Regional Office of the Wage and Hour Division.[32]

Full-time students who are employed in institutions of higher learning which they attend may be paid 85% of the minimum wage. Authorization by certificate must first be obtained from the Regional Office of the Wage and Hour Division.[33]

VOLUNTEER EXCLUSION

Generally, citizens or students who volunteer their services and do not demand or expect compensation are not employees under the FLSA and therefore need not be paid minimum wage. The 1985 Amendments expand the exclusion for volunteers. "Volunteer" workers for public employers who are paid expenses, reasonable benefits, or a nominal fee to perform a service are not considered employees subject to minimum wage or overtime requirements.[34] It will not be a volunteer situation, however, if the individual has a compensated job with the employer and the "volunteer" work is the same type of work as the compensated service.[35] Regulations defining these provisions are required as of March 15, 1986.[36] If prior to April 15, 1986, the practice of a public employer was to treat certain individuals as volunteers, such individuals will be considered to be volunteers until April 15, 1986 and will not be subject to the minimum wage requirement during that period.[37]

---

[30] 29 C.F.R. § 541.302(g).

[31] 29 C.F.R. § 207(p)(2).

[32] 29 C.F.R. Part 520.

[33] 29 C.F.R. §§ 519.11 through § 519.20.

[34] 29 U.S.C. § 203(e)(4).

[35] *Id.*

[36] *Id.*

[37] *Id.*

MINIMUM WAGE COMPLIANCE

The federal minimum wage of $3.35 per hour must be paid to all non-exempt employees.[38] Employees paid a fixed weekly salary must receive the minimum rate after dividing the weekly salary by total hours worked in the established seven day work week. If hours fluctuate, the minimum rate must be paid each week.[39] Employees paid monthly, semimonthly or on some other basis must have wages converted to a weekly basis (i.e., semimonthly wage multiplied by 24, then divided by 52). The resulting weekly equivalent must meet the minimum when divided by hours worked in each work week.[40]

OVERTIME COMPLIANCE

Introduction

Generally, non-exempt employees must be paid one and one-half times their regular hourly rate for hours worked in excess of 40 in an established seven day work week.[41] The major school board employee groups that will be subject to this requirement are secretaries, custodians, cafeteria workers and maintenance employees. The 1985 Amendments modify the cash payment requirement by permitting compensatory time off in lieu of cash as payment for overtime if certain requirements are met.[42]. Overtime must be computed on a weekly basis. If an employee works thirty hours one week and fifty the next, ten hours of overtime were worked because each week stands alone.[43] The employer is free to set the day or hour the seven day period starts, but it must then be a fixed and recurring period. A later change may be made, but must be intended to be permanent.[44] Where a labor union is present, such a change might have to be bargained. To determine overtime obligations, it is first necessary to determine what the employee's "hours worked" and the "regular hourly rate."

Hours Worked

- **The Work Day**

Generally, hours worked include all hours the employee is required or permitted to be on duty, whether actually working or not.[45] Certain activities performed before or after the "workday" are not included unless compensated by contract, custom or practice.[46] The "workday" in general means the period between the time on any workday at which the employee commences his

[38] 29 U.S.C. § 206(a).

[39] 29 C.F.R. § 778.114(c).

[40] 29 C.F.R. § 778.113.

[41] 29 U.S.C. § 207(a).

[42] 29 U.S.C. § 207(o), *discussed infra*.

[43] 29 C.F.R. § 778.100 to 778.104.

[44] 29 C.F.R. [776.105.

[45] 29 C.F.R. Part 785.

[46] 29 U.S.C. § 251 *et seq.*

principal activity or activities and ceases the principal activity or activities.[47] Travel from home to work is normally not working time.[48]

- **Work "Suffered or Permitted"**

Work not requested but "suffered or permitted" is work time. The employee who works beyond his scheduled hours, even if not requested to do so, must be compensated if the employer knows or has reason to know the employee is working.[49] It is irrelevant that there may be a rule barring work beyond scheduled hours. It is management's responsibility to control working time.[50]

- **Waiting Time And Breaks**

Time spent by an employee who is on duty but waiting for work to perform is working time. A secretary reading a book after her reporting time, while waiting for dictation, is working.[51] If an employee is completely relieved of duties for periods long enough to use the time effectively for his own purposes, however, he is not working during such periods.[52] Short rest periods or "coffee breaks" of from five to twenty minutes are hours worked.[53] Bona fide meal periods for thirty uninterrupted minutes or more are not hours worked.[54] The employee must be relieved of all duties during the meal break. A secretary or office worker required to eat at his desk or answer the telephone while eating is working.[55]

- **All Hours Worked Included**

Unless the employee is working on an occasional or sporadic basis in a different type of job from his regular duties, all hours worked for the employer must be counted as hours worked for overtime purposes even though the job assignments are unrelated.[56]

The Regular Rate

- **Based On Hourly Equivalent**

The regular rate on which overtime compensation is based is an hourly rate regardless of whether the employee is paid on salary or on any other basis. Generally, it is determined by dividing the remuneration for that work week by the actual number of hours worked. Salaried employees paid on a semimonthly

[47] 29 C.F.R. Part 790.

[48] 29 C.F.R. § 785.35.

[49] 29 C.F.R. § 785.11.

[50] 29 C.F.R. § 785.13.

[51] 29 C.F.R. § 785.15.

[52] 29 C.F.R. § 785.16.

[53] 29 C.F.R. § 785.18.

[54] 29 C.F.R. § 785.19.

[55] *Id.*

[56] 29 C.F.R. § 778.103.

or other basis must convert compensation to a weekly basis.[57] Generally, all compensation must be included in determining the regular rate subject only to certain specific statutory exclusions.[58] Nondiscretionary bonuses generally must be included.

- **Salaried Employees**

Salaried employees' regular rate depends on the hours the salary was intended to compensate. If a weekly salary is intended to compensate a regular thirty-five hour week, the salary divided by thirty-five is the regular hourly rate.[59] If an employee's contract is for a fixed weekly salary regardless of fluctuating hours, the regular hourly rate will fluctuate accordingly for purposes of computing the overtime rate for hours in excess of forty.[60]

- **Regular Rate Equivalent For Multiple Jobs**

Employees who hold two different types of jobs for the same employer (where the second job is not within the occasional or sporadic exemption) have a regular rate which is the weighted average of such rates. The total weekly earnings from all such rates are added together and divided by total hours worked in both jobs to determine the regular rate.[61] An alternative method is available by advance agreement with the employee to pay overtime based on the regular rate for the particular type of work which is performed during overtime hours.[62]

Exclusions From The Regular Rate

All remuneration received for employment is included in the regular rate except specified statutory exclusions.[63]

- **Gifts**

Sums paid as gifts are excluded from the regular rate. A payment at Christmas or other special occasion as a gift may be excluded even though it is paid with regularity and employees are led to expect it. The payment cannot be based on hours worked or efficiency, and cannot be so substantial when compared with regular wages that it is considered part of the wages.[64]

- **Paid Time Off Duty**

Payments received when no work is performed due to vacation, holiday, illness, failure of the employer to provide work or similar causes are excluded from the

[57] 29 C.F.R. § 778.109.

[58] 29 U.S.C. § 207(e).

[59] 29 C.F.R. § 778.113.

[60] 29 C.F.R. § 778.114.

[61] 29 C.F.R. § 778.115.

[62] 29 C.F.R. § 778.419.

[63] 29 U.S.C. § 207(e).

[64] 29 C.F.R. § 778.212.

regular rate. Travel and other expenses incurred by an employee and reimbursed by the employer are also excluded.[65]

- **Discretionary Bonuses**

Discretionary bonuses are excluded from the regular rate. A bonus is considered discretionary if the employer exercises sole discretion in determining at or near the end of the period the bonus will cover whether the payment is to be made and the amount of payment.[66] Bona fide thrift and savings plan payments are also excluded.[67] Bonuses which are a percentage of total earnings including overtime pay are excluded because an overtime premium is built into the bonus.[68]

- **Certain Fringe Benefits**

Retirement, life, accident, or health insurance or similar benefits for employees paid irrevocably to a trustee or third person are excluded from the regular rate. It is the employer's contribution to such plans that is excluded.[69]

- **Premium Rates**

Three types of premium rate compensation are recognized as overtime premiums. They are therefore not only excluded from the regular rate calculation but are also credited against any statutory overtime liability.[70]

a. A premium rate paid for hours worked in any day or work week because such hours worked exceed eight in a day or forty in a work week is excluded from the regular rate and credited against overtime liability;[71]
b. Premium pay for holidays, Saturdays or Sundays or regular days of rest is excluded from the regular rate and credited against overtime if such a rate is at least one and one-half times the regular rates for such work on other days;[72]
c. A premium rate for employees provided by an employment contract (or collective bargaining agreement), for work outside the hours established by the contract or agreement as the normal or regular workday or work week, is excluded from the regular rate and credited as overtime pay if the premium rate is at least one and one-half times the regular rate for work performed during the regular work day or work week.[73]

Compensatory Time and Trading Time

- **Compensatory Time**

The 1985 Amendments permit public employers to provide compensatory time in lieu of cash as compensation for overtime. One and one-half (1–1/2)

---

[65] 29 C.F.R. § 778.216 – 778.224.

[66] 29 C.F.R. § 778.211.

[67] 29 C.F.R. § 778.213.

[68] 29 C.F.R. § 778.210.

[69] 29 C.F.R. § 778.214.

[70] 29 U.S.C. § 207(h).

[71] 29 U.S.C. § 207(e), 29 C.F.R. § 778.202 through § 778.206.

[72] *Id.*

[73] *Id.*

hours of compensatory time must be provided for each hour of overtime.[74] This and the other requirements of the compensatory time amendment became effective on April 15, 1986 when the exemption from federal overtime requirements expired. The requirements for a compensatory time practice are:

a. Effective April 15, 1986, compensatory time off may be provided in lieu of cash if there is a labor contract or other agreement with the employees' labor representative which authorizes compensatory time off in place of paid overtime.[75] In the absence of a labor representative, compensatory time may be provided if there is an agreement or understanding between the employer and employee, before performance of the work, to provide compensatory time.[76] For employees hired before April 15, 1986, the employer's regular practice in effect on April 15, 1986 will qualify as such an agreement.[77]

b. An employee may not accrue more than 240 hours of unused compensatory time for overtime hours worked after April 15, 1986.[78] (A 480 hour limit applies to employees who work in public safety, emergency response, or seasonal activities.) Employees who have accrued unused compensatory time up to these limits must be paid in cash for additional overtime.[79]

c. If an employee is paid cash for accrued compensatory time, it must be paid at the employee's regular rate at the time of payment. Upon termination of employment, unused compensatory time must be paid at a rate of not less than the employee's average regular rate for the last three years of employment or the employee's final regular rate, whichever is higher.[80]

d. An employee who asks to use accrued compensatory time must be permitted to use it within a "reasonable period" of the request if the use does not "unduly disrupt" the operation of the employer.[81] (Presumably regulations will be issued to give meaning to those terms.) Compensatory time hours used will not count as hours worked during the applicable work period for purposes of determining overtime.[82]

e. A collective bargaining agreement in effect on April 15, 1986 which permits compensatory time off will continue unaffected until its expiration, except that after April 14, 1986 compensatory time must satisfy all the requirements described above, most importantly that one and one-half hours of compensatory time be provided for every hour of overtime.[83] The pre-April 15, 1986 exemption from FLSA overtime liability will not nullify pre-April 15 labor contract obligations to provide cash overtime payments or compensatory time.

---

[74] 29 U.S.C. § 207(o).

[75] 29 U.S.C. § 207(o).

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

- **Trading Time**

The 1985 Amendments also permit public employees to "trade time" with fellow employees performing the same type of work, substituting for each other without affecting overtime calculations.[84] The practice of trading time must be approved by the employer, but trading time must then be at the employee's option.[85] Employers are not required to keep records of the hours of substitute work.[86]

RECORD KEEPING REQUIREMENTS

Every employer covered by the FLSA must keep records about each worker who is entitled to minimum wage and overtime pay, and must also maintain certain information about exempt employees.

Records For Non-Exempt Employees

Employers must keep the following records for employees subject to minimum wage and overtime requirements: name and social security number, address, birth date (if younger than nineteen years old), sex and occupation, day and time the employee's work week begins, the regular hourly rate of pay, hours worked each day and each week, amount of straight time wages paid each week, amount of overtime wages paid each week, additions or deductions for wages each pay period, total wages paid each pay period, date of payment and pay period covered by the payment.[87]

Records For Exempt Employees

The following records must be kept for exempt personnel: name and social security number, address, date of birth if under age 19, sex and occupation, day and time the employee's work week begins, total wages paid each pay period, date of payment and pay period covered by the payment.[88] The employer must keep the basis upon which wages are paid in sufficient detail to permit calculation of the employee's total remuneration for each pay period.[89]

Method And Retention Period

There is no required method for keeping time records other than that the method be complete and accurate. Time records must be kept for two years.[90] Pay records must be kept for three years.[91]

---

[84] 29 U.S.C. § 207(p)(3).

[85] *Id.*

[86] 29 U.S.C. § 211(c).

[87] 29 C.F.R. § 516.2.

[88] 29 C.F.R. § 516.3.

[89] *Id.*

[90] 29 C.F.R. § 516.6.

[91] 29 C.F.R. § 516.5.

Legal Aspects of Child Abuse and Public Schools

by: W. Richard Fossey

INTRODUCTION

Child abuse is becoming recognized as a serious problem in the United States.[1] Recently, the schools have become the battleground for fighting it. School teachers and administrators have special obligations to report child abuse, and school districts are often involved in child abuse investigations. Like it or not, state legislatures and the public expect more and more from school districts as far as detecting and preventing child abuse. In addition, parents are more willing to sue school districts if a school employee commits an act of child abuse against the child in the school district's care.

This article discusses the legal obligations of school teachers and administrators to report child abuse and the potential liability for failure to report such abuse. The article then discusses the implications for school districts of allowing social agencies and the police to interview school children on school premises about child abuse. Finally, this article discusses a school district's liability when a school employee commits an act of child abuse on school grounds and suggests ways for school districts to respond to cases of child abuse in the schools.

REPORTING CHILD ABUSE

In 1974 Congress passed the Child Abuse Prevention and Treatment Act[2] which encourages states to improve their child abuse reporting laws by awarding grants to states which pass legislation meeting the criteria of the Act. In order to qualify for a grant, a state must have legislation, in effect, which grants immunity to persons reporting child abuse and which provides for an investigation of every report of known or suspected child abuse.[3]

Partially in response to federal legislation and partly out of a growing demand for better child protective systems, states began passing statutes requiring certain professionals, including school teachers, to report child abuse. At least 48 states now require teachers to report known or suspected child abuse discovered in

---

[1] See, Cerkovnik, *The Sexual Abuse of Children: Myths, Research and Policy Implications*, 89 Dickson L. Rev. 691 (1985) and the source listed therein.

[2] 42 U.S.C. §§5101–5106 (1983 and Supp. 1985).

[3] For a general discussion of the development of child abuse reporting statutes *see*, Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 Villanova L. Rev. 458 (1978).

the course of their professional duties.[4] Virtually every state statute provides that a teacher who makes a good-faith report of suspected child abuse is immune from civil or criminal liability,[5] and the courts have liberally construed these immunity statutes in favor of persons who report.[6] One Colorado court, however, ruled that a plaintiff who claimed that a child abuse report was made in bad faith had made an allegation sufficient to raise the possibility that the report was not entitled to statutory immunity.[7] Nevertheless, a teacher who reports suspected child abuse in good faith runs very little risk of incurring liability as a result of that report.

On the other hand, there is no question that school districts and their employees may be liable for failing to report child abuse to a designated investigating agency. At least two states specifically impose civil liability by statute.[8] In *Landeros v. Flood*,[9] the California Supreme Court ruled that a physician could be held liable under California's reporting law if he failed to report a child showing symptoms of battered child syndrome if it appeared that the child's injuries were intentionally inflicted. The statutory duty to report suspected child abuse may establish a standard of reasonable care, the violation of which could lead to civil liability.[10]

In general, school teachers and administrators are well informed of their duty to report child abuse and willingly perform that duty. Nevertheless, a formal school policy for carrying out that duty is a good idea. Such a policy should provide a procedure for recording reports of suspected child abuse and should also require school employees to notify their superiors at the same time they report suspected abuse to the designated investigative agency.[11] Such a policy will provide a record that school employees performed their duty to report child abuse and will also alert school administrators that police or social workers may be visiting the school in response to a report.

School counsellors occasionally ask whether they must report child abuse which they learn about in the counselling/client relationship. In most states, the answer is yes. Some states have passed statutes which hold that certain privileged relationships, including the physician/patient relationship, do not provide a basis for failing to report child abuse.[12] In other jurisdictions, courts have held that the child abuse reporting laws supersede the duty of confidentiality in otherwise privileged communications. For example, in *State v. R. H.*,[13] the Alaska Court of Appeals ruled that the communication between a clinical psychologist and his

---

[4] Note, *Civil Liability for Teachers' Negligent Failure to Report Child Abuse*, 28 Wayne L. Rev. 183, 185, n. 11 (1981).

[5] *See e.g.* Alaska Stat. §14.17.050 (1984). Colo Rev. Stat. §19–10–110 (Supp. 1985).

[6] McDonald v. Children's Services Division, 71 Or. App. 751, 694 P.2d 569 (1985); Mille v. Beck, 80 A.D.2d 912, 440 N.Y.S.2d 691 (N.Y.App Div 1981).

[7] Martin v. County of Weld, 43 Colo. App. 49, 598 P.2d 532 (1979).

[8] Ark. Stat. Ann. §42–816(b) (Cum. Sup. 1985); Colo. Rv. Stat. §19–10–104(4)(b) (1978).

[9] 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).

[10] Restatement (Second) of Torts, §285–86 (1965).

[11] *See* Ind. Code §31–6–11–3 (1980) which requires suspected child abuse to be reported to a senior school administrator as well as to the statutory investigative agency.

[12] *See e.g.*, Mo. Rev. Stat. §210.140 (1983) which states that privileged communications other than those between client and attorney, do not constitute grounds for failure to respond.

[13] 683 P.2d 269 (Alaska Ct. App. 1984).

patient were privileged in the context of criminal proceedings but that the physician/patient privilege was abrogated for the purposes of child protection proceedings. The Minnesota Supreme Court also ruled that a defendant cannot claim the medical privilege as a basis for excluding a report by medical practitioners that the defendant had admitted to medical staff that he sexually abused a child.[14]

INVESTIGATION OF CHILD ABUSE BY OUTSIDE AGENCIES

State statutes requiring school employees to report child abuse to a designated agency generally require the agency to investigate the report.[15] Often, the police and social agencies attempt to interview suspected child abuse victims in the schools, particularly when the investigation involves incest or physical abuse in the home. Obviously, the school is a good place to interview children without the parents' knowledge.

School districts should be cautious about allowing outside agencies to interview school children on school premises unless the parents consent. Permitting the police or social agencies to use the schools to investigate child abuse brings a host of problems and exposes the school district to liability.

The United States Supreme Court, in *New Jersey v. T.L.O.* permitted school officials to conduct searches in the schools under a less rigorous standard than that applied to the police under the Fourth Amendment to the United States Constitution.[16] School officials need not adhere to the requirements that the search be based upon "probable cause." Rather, the legality of a school search depends upon the reasonableness of the search under all the circumstances. *New Jersey v. T.L.O.* acknowledges that school officials have a legitimate interest in maintaining order in the schools and should be permitted to conduct searches under less stringent standards than apply to the police. Nevertheless, the Supreme Court's decision assumes that school officials conducting searches will act in furtherance of school policy and not as agents of the police.[17]

It seems likely that if school officials follow a practice of allowing the police to routinely conduct child abuse investigations on school premises without parental permission, then the schools may be considered as agents of the police, and the stricter standards of search and seizure under the Fourth Amendment might then apply to the schools. Even in the context of investigations involving incest or physical abuse of children by parents, school officials should be cautious about permitting the police to interview school children on school grounds. To do so blurs the distinction between the role of educators and the role of law enforcement officials.

Moreover, permitting the police to interview school children regarding sexual matters may expose the school district to liability. For example, in *Andaloro v. Fairbanks North Star School District*,[18] a mother sued a school district and law enforcement officials who questioned her twelve year old daughter in the context

---

[14] State v. Odenbrett, 349 N.W.2d 265 (Minn. 1984).

[15] *See e.g.*, Alaska Stat §14.17.025 (1984). Tex. Fam. Code Ann. §31.056 (Vernon 1975).

[16] ___ U.S. ___, 105 S.Ct. 733 (1985).

[17] 105 S.Ct. at 744, fn. 7.

[18] *Andaloro v. Fairbanks North Star School District* No. F82–025 Civil, Memorandum and Order (D.Alaska January 26, 1984).

of a child abuse investigation. According to the mother, she instructed school officials not to interview her daughter until after the mother arrived, but the interview took place without the mother being present. The mother also alleged her daughter tried to leave the interview but was told to sit down for more questions.

Although the case was subsequently dismissed, a United States district court judge ruled that the plaintiff had made out a cause of action for unreasonable search and seizure of a material witness under the Fourth Amendment.

The plaintiff in *Andaloro* did not make a claim for false imprisonment. Nevertheless, if police or school officials refuse to terminate an interview with a school child after the child expresses the desire to leave, all those participating in such an interview could be liable for false imprisonment.[19]

School districts should also consider the requirements of the Family Educational Rights and Privacy Act (FERPA) when outside agencies seek to conduct child abuse investigations in the schools.[20] Under the Act, no federal funds shall be made available to any school district which has a policy or practice of releasing certain confidential student records to outside agencies without the parents' written consent.[21] If a school district releases student medical records or student files to the police or social agency without obtaining the written consent of the affected student's parents, the school district may be in violation of FERPA.

State laws vary with regard to a district's obligation to permit the police or social agencies to interview child abuse victims in the schools. For example, Texas law permits an authorized investigative agency to obtain, upon cause shown, a court order permitting access to alleged child abuse victims in order to conduct interviews.[22] This indicates that school districts in that state may be required to allow outside agencies to conduct investigations in the schools. If a school district is uncertain about its legal obligations under state law to grant access to outside agencies for the purposes of investigating child abuse, then the school district should be prepared to go to court to seek declaratory relief defining what its obligations are with regard to accommodating the police or social workers.

School districts should develop a policy for responding to investigations concerning child abuse. First of all, except in extraordinary circumstances, no child should be interviewed concerning sexual matters without parental permission. Only top level administrators, either supervisors or the superintendent, should have the authority to permit school children to be interviewed by outside agencies. In all cases in which school officials deem it appropriate to permit such interviews to take place without parental permission, a school official should monitor the interview and be prepared to terminate the interview if a child desires to leave, or if the interview is conducted in an inappropriate manner.

CHILD ABUSE BY SCHOOL EMPLOYEES

Unfortunately, a small number of school employees commit acts of sexual or physical abuse against children in their care every year. At least in certain circumstances, school districts may be liable for these abuses.

---

[19] *See generally*, Sindle v. New York Transit Authority 352 N.YS. 183, 33 N.Y.2d 293, 307 N.E.2d 245 (1973).

[20] Pub L. 93–380, Title V, 513(a), Aug. 21, 1974, 88 Stat. 571, codified at 20 U.S.C. § 1232, (1978 and Supp. 1985)).

[21] 20 U.S.C. § 1232(b) (1978).

[22] Tex. Fam. Code §34.05(c) (Supp. 1986).

As a general matter, criminal abuse by school employees falls outside the scope of the employee's employment, and thus the school district is not liable for the abuse under a respondeat superior theory. For example, in *Boykin v. District of Columbia*,[23] the District of Columbia Court of Appeals dismissed a complaint against the District of Columbia School District arising from the sexual assault of a blind, deaf and mute student by the coordinator of the program for blind and deaf students. The court found that the coordinator's conduct was outside the course of his duties for the school district, and thus the district was not liable.

Moreover, courts have held that school districts cannot be held liable for sexual abuse by their employees under a theory of negligent supervision, simply because an act of abuse took place while a student was in the employee's care. For example, in *Bozarth v. Harper Creek Board of Education*,[24] the Michigan Court of Appeals ruled that a school district was not liable for a teacher's homosexual assault on a student simply because the employee's work situation offered an opportunity for such an activity.[25]

At least one court has ruled that a school district is not liable for a sexual assault on school grounds because the criminal use of school property was not reasonably foreseeable.[26] That case did not involve an assault by a school employee, but the reasoning would seem to apply to sexual misconduct by school employees.

On the other hand, a trend is emerging in the courts to hold owners of premises, including public bodies, liable for the intentional acts of third parties. Generally, liability will be imposed on premises owners only when the owner places the plaintiff in a situation where injury is foreseeable or fails to exercise due care to guard against a foreseeable danger.[27] For example, in *School Board of Palm Beach County v. Anderson*,[28] the court ruled that a jury question was presented as to whether a previous criminal act imposed a duty on the school board to protect students from similar attacks.

Futhermore, it is clear that a school board may be liable for a sexual assault by a school employee if the school district engaged in negligent supervision of the employee. For example, in *Collins v. School Board of Brouard County*,[29] a Florida court held that a school district could be liable for a sexual assault on a student in a shop class if the shop class was improperly supervised. That case involved an assault against a student by another student, not by a school employee. Nevertheless, there may be instances in which sexual abuse by a teacher, custodian or other employee could be prevented by proper supervision of the employee.

School districts should take special care with regard to hiring new employees. If an assault by a school employee could have been prevented by a careful

---

[23] 484 A.2d 560 (D.C. Ct. App. 1984).

[24] 94 Mich. App. 351, 288 N.W.2d 424 (1979).

[25] *See also*, Fisher v. Independent School District No. 622, 357 N.W.2d 152 (Minn. Ct. App. 1984).

[26] Joner v. Board of Education of the School District of Philadelphia, 496 A.2d 1288 (Pa. Commw. 1984).

[27] Brown and Doyle, *Growing Liability for Premises Owners*, 72 ABA L.J. 64, 66 (March 1, 1986). *See also* Hauserman, *Rape on Campus: Post Secondary Institutions as Third Party Defendant*, 8 J. of College and University Law 182 (1981).

[28] 411 So.2d 940 (Fla. 1982).

[29] 471 So.2d 560 (Fla. Ct. App. 1985).

background check of the new employee, the school districts may be liable for their carelessness.

In 1984, Congress passed an act popularly referred to as the "DeConcini Act" encouraging the states to develop procedures for checking the criminal histories of individuals who come in contact with children.[30] More and more, states are passing laws encouraging school districts and day care centers to screen new employees for criminal records of child abuse.[31] In years to come, these statutes may establish the standard of care for school districts. School districts should become familiar with the requirements of state screening laws which apply to them.

School districts should not neglect to review their corporal punishment policies in the context of potential liability for child abuse. In 1984, the American Bar Association issued a report recommending the abolishment of corporal punishment on the grounds that it constitutes a form of child abuse.[32] The West Virginia Supreme Court recently ruled that schools could not use paddles, whips or mechanical devices to administer corporal punishment.[33] Although *Ingram v. Wright*[34] established that corporal punishment is not cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution, school districts may find that their corporal punishment policies will be challenged on the grounds that they violate state child abuse statutes.

School districts should establish policies to decrease the possibility that a school employee will commit an act of child abuse on school premises. First, screening and hiring practices should include inquiries of former employers. These inquiries should be documented and kept in the employee's personnel file as evidence that the school district took reasonable precautions in hiring a particular employee. If your state mandates a check for criminal convictions, then the district should obviously comply with the statute.

Secondly, the school district should review, on a regular basis, its supervision policies for employees. Employees who are with children in isolated areas, or employees in contact with handicapped children may require special supervision. Schools should be designed to minimize isolated and hidden areas. School districts should consider scheduling brief child abuse awareness programs which will encourage children to report abuse.

Dismissal proceedings against school employees who commit acts of sexual abuse involve special problems. A teacher dismissed for incompetence or insubordination generally has not done anything which will expose the school district to liability. Teachers dismissed for acts of sexual abuse have committed acts which may expose the district to massive liability. Every decision that the school district makes when dealing with such an employee should be made with an awareness of the school district's exposure to a lawsuit by the parents of an abused child.

In many cases, a school employee who commits a serious act of child abuse against a student will be charged by the police. In such cases, the employee will

---

[30] Act of October 12, 1984, Pub. L. No. 98–473, Title IV, §401, 98 Stat. 2195–2197. For a discussion of the DeConcini Act, see Davidson, *Protection of Children Through Criminal History Record Screening, Well-Meaning Promises and Legal Pitfalls*, 89 Dickinson L. Rev. 577 (1985).

[31] A list of state screening statutes is contained in Davidson, *Protection of Children Through Criminal History Record Screening* 89 Dickinson L. Rev. 577, 603 (1985).

[32] American Bar Association Report on Corporal Punishment (1984).

[33] Smith v. West Virginia Board of Education, 295 S.E.2d 680 (W.Va. 1982).

[34] 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed. 711 (1977).

be jailed or will be released on bond under a condition that the employee not be in contact with minor children. Thus the police action may be the means whereby the teacher is removed from the school setting without the necessity of a school district administrative action. Sometimes school districts will be content to allow criminal proceedings to run their course without taking any administrative action.

Although some school districts may prefer to allow criminal proceedings to be completed before dismissing a teacher, the school districts are not required to wait. In *Hankla v. Governing Board of Roseland School District*, the court ruled that school districts may begin dismissal proceedings against a teacher while a criminal action is pending.[35] Moreover, since it is generally recognized that a teacher is entitled to compensation until dismissal proceedings are complete,[36] delays in dismissal proceedings may entitle a school employee to get his pay check even though the employee is in jail and has serious criminal charges pending.

Under *Cleveland Board of Education v. Loudermill*,[37] a public employee is entitled to at least some sort of informal hearing prior to suspension. This must be followed by a formal dismissal hearing under the appropriate statutory scheme.[38] Districts should remember that a pre-suspension hearing may be required even though the employee is accused of serious sexual misconduct with students.

Districts are understandably reluctant to conduct hearings which may involve testimony of school children about sexual abuse. As much as possible the school district should rely on the testimony of adults. Since a single incident of inappropriate sexual conduct may provide grounds for dismissal, school districts may choose to present the testimony describing a relatively untraumatic single incident of sexual misconduct rather than requiring one school child or a number of school children to testify extensively about sexual misconduct.

In most instances, the courts will uphold a school board's decision to dismiss a teacher who engages in sexual misconduct with a student.[39] For example, a recent Illinois appellate court ruled that a school district could dismiss a physical education teacher who pinched several second grade girls without complying with the statutory requirement that school districts warn teachers about remedial behavior prior to dismissing them.[40] According to the court, "it is inconceivable that a situation would arise in which immoral conduct of any type between a teacher and student could be excused by reprimand."[41] A Washington court ruled that a school district could fire a teacher for inappropriate sexual behavior with female students without putting the teacher on a plan of improvement.[42]

---

[35] 46 Cal. App.3d 644, 120 Cal. Rptr. 827 (1975).

[36] Kenai Peninsula School District v. Brown, 691 P.2d 1034 (Alaska 1984).

[37] ___ U.S. ___, 105 S.Ct. 1487 (1985).

[38] A pre-*Loudermill* case suggests that a pre-suspension hearing may not be required in cases involving serious potential harm to school students. Nichols v. Eckert, 504 P.2d 1359 (Alaska 1973).

[39] For a comprehensive discussion of cases in this area, see Winks, *Legal Implications of Sexual Contact Between Teacher and Student*, 11 Journal of Law and Education 437 (1982). *See also*, Annot. 78 A.L.R.3d 19 (1972 and Supp. 1985).

[40] Board of Education of Argo-Summit School District v. Hunt, 487 N.E.2d 24 (Ill. App. 1 Dist. 1985).

[41] *Id.* at 27.

[42] Potter v. Kalama Public School District, 31 Wash. App. 838, 644 P.2d 1229 (1982).

School districts should be aware that they may be uninsured with regard to acts of child abuse by their employees.[43] Some insurers take the position that child abuse is an intentional act of misconduct involving physical injury for which the school district does not have insurance under the school district's errors and omissions policy. Since sexual assault generally involves physical injury, the school district should notify both its errors and omissions carriers and its personal injury liability carrier if a school employee is accused of child abuse.

The district should also be aware that the statute of limitations for acts of child abuse by any school employee may be extremely long. In many jurisdictions, the statute of limitations for a tort committed against a minor is tolled until after the minor reaches the age of majority.[44] Thus, a district's exposure may last ten years or more.

Finally, any time a school employee commits an act of child abuse, the district should be sensitive to the community's reaction. A school district should take such steps as are necessary to reassure the community that the school district is acting appropriately to protect students. School districts should not overreact to an incident of child abuse by giving the police carte blanche to interview school children. Finally, the school district should be very cautious about disciplining an employee's supervisor for failing to detect or report the employee's misconduct.[45] Such actions may help make a plaintiff's case in the event a lawsuit is filed.

CONCLUSION

More and more, state statutes are placing heavy responsibilities on school districts and their employees to combat child abuse. School officials are required to report child abuse, and law enforcement officials often expect school officials to consent to school children being interviewed on school grounds. School administrators need to develop policies for dealing with child abuse reports and investigations.

In all likelihood, a school district's liability for child abuse on school premises is going to increase in the coming years. The ability of school districts to obtain insurance coverage for this type of conduct is probably going to diminish. Sound supervision and screening policies will decrease the likelihood of child abuse in the schools. Education programs encouraging students to report child abuse may also be beneficial. In most instances, districts should be aggressive in dismissing child abusers, while being sensitive to the fact that increased publicity may increase the possibility of a lawsuit. Every decision with regard to responding to child abuse by school employees should be made with the goal of minimizing community concern and the likelihood of civil litigation.

---

[43] Horace Mann Insurance Co. v. Independent School District No. 656, 355 N.W.2d 413 (Minn. 1984).

[44] *See e.g.*, Alaska Stat. 09.10.140 (1983).

[45] *See generally*, Bellevue Public School District No. 405 v. Benson, 707 P.2d 137 (Wash. App. 1985)(failure to report suspected sexual abuse provides grounds for demoting principal to teaching position).

New Jersey v. T.L.O.: The Unanswered Questions

by: Richard A. Schwartz
Ann L. Majestic
J. David Farren

THE T.L.O. DECISION

On January 15, 1985, the United States Supreme Court, in the landmark decision *New Jersey v. T.L.O.*,[1] established the constitutional requirements for searches of individual students by school officials. As a threshold matter, the Court held that the Fourth Amendment's prohibition against unreasonable searches and seizures applies to searches of public school students by school officials. In accord with the majority of lower court opinions, the Court held that a school official may search a student based upon a "reasonable suspicion" that the search will uncover evidence of a violation of the law or of a school's rules.

Finding that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject," the Court also held that the warrant and probable cause requirements traditionally applied to searches would not apply to searches by school authorities.[2]

In applying the Fourth Amendment to school searches, the Court adopted a two-pronged "reasonableness" test.[3] Under the first prong of this test, a student may be searched by a school official "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[4] In addition, the second prong requires that the "search as actually conducted [must be] reasonably related in scope to the circumstances which justified the interference in the first place."[5] For the scope of the search to be permissible, it must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[6]

The Supreme Court emphasized that searches based upon reasonable suspicion that are reasonable in scope may be conducted to detect even minor infractions of school rules. The majority opinion expressly rejected Justice Ste-

---

[1] ___ U.S. ___, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

[2] ___ U.S. at ___, 105 S.Ct. at 743, 83 L.Ed.2D at 733–34.

[3] *Id.*

[4] ___ U.S. at ___, 105 S.Ct. at 744, 83 L.Ed.2d at 735.

[5] *Id.*

[6] *Id.*

vens' suggestion in his dissenting opinion that certain school rules are too "trivial" to justify a search.[7]

Although the *T.L.O.* decision answers important questions concerning the applicability of the Fourth Amendment in the public school setting, it leaves open many issues including the applicability of the exclusionary rule to evidence seized by school officials in unreasonable searches; the applicability of the reasonable suspicion standard and the Fourth Amendment to searches of school lockers, desks and students cars; the propriety of strip searches; the validity of searches of groups of students without suspicion focused on any particular student; and the legal requirements for searches conducted in schools by, or in conjunction with, law enforcement authorities.

THE SUPREME COURT'S PRIOR INTERPRETATIONS OF THE REASONABLE SUSPICION STANDARD

In *T.L.O.* the Supreme Court indicates only generally what constitutes "reasonable suspicion." The Court refers to the necessity of a "sufficient probability" of uncovering evidence of an offense, but fails to quantify more precisely the degree of probability required to justify a search. The Court provides some guidance on this issue, however. It is clear that this standard requires less than "probable cause" but more than a "hunch."[8] In addition, the Court notes that reasonable suspicion may be based upon "common sense conclusio[ns] about human behavior upon which practical people—including government officials—are entitled to rely."[9] Further, the tenor of the opinion indicates that school officials should be granted some deference in making the difficult decisions involved in maintaining order in the public schools. The Court states that it would be inappropriate to impose a "crabbed notion of reasonableness."[10]

T.L.O. is the only Supreme Court case to discuss reasonable suspicion in the public school setting. However, several Supreme Court cases discuss the "reasonable suspicion" standard in the context of criminal law enforcement. Although these cases generally fail to elaborate on the abstract requirements of the "reasonable suspicion" standard, the facts of these cases provide some guidance as to what constitutes reasonable suspicion.

The reasonable suspicion standard was first crafted by the Supreme Court in *Terry v. Ohio*,[11] a case repeatedly cited with approval in the *T.L.O.* decision. In *Terry* the Supreme Court held that a police officer may "stop and frisk" an individual without the probable cause necessary for an arrest if the officer has a reasonable suspicion that the individual is involved in criminal activity and may be armed and dangerous. The reasonable suspicion standard was satisfied in *Terry* because the officer had observed the two suspects repeatedly taking turns "casing" a store for a robbery by slowly walking past it and then conferring on a street corner.

In formulating the reasonable suspicion standard, the Court in *Terry* stated that "the police officer must be able to point to specific and articulable facts

---

[7] *Id.* at ___, n.9, 105 S.Ct. at 744, n.9, 83 L.Ed.2d at 735, n.9.

[8] ___ U.S. at ___, 105 S.Ct. at 746, 83 L.Ed.2d at 737.

[9] *Id.*

[10] ___ U.S. at ___, 105 S.Ct. at 745, 83 L.Ed.2d at 736.

[11] 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[12] Thus, a reasonable suspicion must be based on facts, but the officer is entitled to draw reasonable inferences from the facts in reaching the decision to stop and frisk. The Court also held that the reasonable suspicion standard is an objective standard. The subjective good faith of the officer is not sufficient.[13] The issue is whether a reasonably prudent person in the circumstances "would be warranted in the belief that his safety or that of others was in danger."[14]

The Supreme Court has decided a series of "stop and frisk cases" in the aftermath of *Terry v. Ohio*.[15] Although none of these Supreme Court "stop and frisk" cases concerns searches in the public schools, some of the factors articulated by the Court may be applicable to the school setting. Applying these cases, the following facts may, in various combinations, support a finding of reasonable suspicion to justify the search of a particular student: highly unusual conduct consistent with the hypothesis that the student is engaged in unauthorized activity; furtive, evasive or hostile conduct; a bulge in the student's clothing which may indicate the possession of contraband; tips supplied by reliable informers, past incidents involving the suspected student; and coincidences in time between the suspected student's location and a particular known unauthorized activity.

In the final analysis, school officials must consider the "totality of the circumstances." Any one of the above factors standing alone may or may not be sufficient to constitute reasonable suspicion in a given case. In addition, known facts which cut against a finding of reasonable suspicion must be considered.

THE APPLICABILITY OF THE EXCLUSIONARY RULE TO SCHOOL SEARCHES

In the *T.L.O.* case, the Supreme Court ruled that the student search at issue was based upon reasonable suspicion and therefore satisfied the Fourth Amendment. Because the search was upheld, the Court did not reach the question which it had originally granted certiorari to decide: the admissibility in a criminal proceeding of evidence seized during an illegal search by school officials. A closely related issue is whether such evidence is admissible in a school disciplinary hearing.

Admissibility in Criminal Proceedings

Although the Supreme Court did not reach the exclusionary rule issue in *T.L.O.*, the New Jersey Supreme Court found that the exclusionary rule is applicable to illegal searches by school officials.[16] The vast majority of other courts that have considered this issue also have ruled that evidence seized by public

---

[12] *Id.* at 21, 88 S.Ct. at 1880, 20 L.Ed.2d at 906.

[13] *Id.* at 21–22, 88 S.Ct. at 1880, 20 L.Ed.2d at 906.

[14] *Id.* at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909.

[15] *See also* Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979); Pennsylvania v. Mims, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

[16] State ex rel. T.L.O., 94 N.J. 331, 463 A.2d 934 (1983), *rev'd*, ___U.S. ___, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

school officials in violation of the Fourth Amendment is inadmissible in a subsequent criminal trial.[17] One state court has even applied the exclusionary rule to a search by private college officials.[18]

In finding that the exclusionary rule applies in judicial proceedings to the fruits of illegal school searches, these courts have reasoned that school officials are public officials and, thus, subject to the Constitution's limitations on government action. Because a search by a school official constitutes "state action," it is subject to scrutiny under the Fourth Amendment and, these courts conclude, the fruits of an illegal search are inadmissible under application of the exclusionary rule.

A few decisions have analyzed the purpose of the exclusionary rule before applying it in criminal proceedings to searches in the school context. In an Illinois state court case, *In re J.A.*,[19] the court found that the exclusionary rule would deter school officials from violating a student's constitutional rights just as it deters police officers from conducting illegal searches.[20] In *People v. Scott D.*,[21] a New York court reasoned that the purpose of searches by school officials is to protect other students from the harmful effects of the contraband in the possession of the student searched and not to secure criminal convictions.[22] Thus, excluding evidence of an illegal search in a later criminal proceeding would not interfere with school officials' ability to confiscate the contraband. In addition, the court noted that the consequences to the student of an illegal search are just as severe at the criminal proceeding whether the evidence was originally seized by a police officer for the purpose of securing a conviction or by a school official for another purpose.[23]

A few courts have held that the exclusionary rule is inapplicable in criminal proceedings despite illegal searches by school officials.[24] These cases conclude that school officials are more like private individuals or parents than law enforcement officers and, therefore, the Fourth Amendment does not apply to these searches.[25] The validity of this reasoning is very questionable, however, given the Supreme Court's holding in *T.L.O.* that actions of school officials are actions of the state subject to scrutiny under the Fourth Amendment.

A Georgia court has expressed two additional theories for not applying the exclusionary rule that retain vitality after *T.L.O.*. In *State v. Young*[26] the court

[17] State v. Baccino, 282 A.2d 869 (Del. Super. 1971); State v. Walker, 19 Or. App. 420, 528 P.2d 113 (1974); People v. Scott D., 34 N.Y.2d 483, 315 N.E.2d 466 (1974); State v. Mora, 307 So.2d 317 (La. 1975); L.L. v. Circuit Court of Washington County, 90 Wis.2d 585, 280 N.W.2d 343 (1979); In re J.A., 85 Ill. App. 3d 567, 406 N.E.2d 958 (1980); In re Dominic W., 48 Md. App. 236, 426 A.2d 432 (1981); In re Bobby B., 172 Cal. App. 3d 377, 218 Cal. Rptr. 253 (Cal. App. 1985); In re Robert B., 172 Cal. App. 3d 363, 218 Cal. Rptr. 337 (1985).

[18] People v. Haskins, 48 A.D.2d 480, 369 N.Y.S.2d 869 (1975).

[19] 85 Ill. App. 3d 567, 406 N.E.2d 958 (1980).

[20] *Id.* at 573, 406 N.E.2d at 962.

[21] 34 N.Y.2d 483, 315 N.E.2d 466 (1974).

[22] *Id.* at 487, 315 N.E.2d at 468.

[23] *Id.* at 488, 315 N.E.2d at 469.

[24] State v. Young, 234 Ga. 488, 216 S.E.2d 586, *cert. denied*, 423 U.S. 1039, 96 S.Ct. 576, 46 L.Ed.2d 413 (1975); R.C.M. v. State, 660 S.W.2d 552 (Tex. App. 1983).

[25] 234 Ga. at 494, 216 S.E.2d at 591; 660 S.W.3d at 553.

[26] 234 Ga. at 491, 216 S.E.2d at 589–90, *citing* United States v. Calandra, 414 U.S. 338, 349, 94 S.Ct. 613, 620, 38 L.Ed.2d 561, 572 (1974).

reasoned that the exclusionary rule is not mandated by the Fourth Amendment but is merely a judicially created remedy to deter improper actions by law enforcement officials. In addition, the *Young* court noted that students subject to illegal searches can bring tort actions to remedy violations of their constitutional rights.[27] The court considered this potential civil liability to be sufficient to deter illegal searches by school officials.

Applicability of the Exclusionary Rule to School Disciplinary Proceedings

Courts are more evenly divided on the issue of whether the exclusionary rule applies to school disciplinary proceedings. This split of authority derives primarily from the different ways courts have viewed these hearings. Although a school disciplinary hearing is far from a full-blown criminal action, it is a proceeding in which significant penalties may be assessed.

Jones v. Latexo Independent School District,[28] decided by a federal district court in Texas, has been the leading case holding that the exclusionary rule applies to school disciplinary proceedings. In *Jones*, a student was suspended from school and suffered a grade point loss after sniffer dogs located "drug paraphernalia" in his possession. Noting that an exclusionary rule has been applied by the United States Supreme Court to civil as well as criminal proceedings,[29] the court held that the rule would have the intended deterrent effect if applied to the school disciplinary hearings as well.[30] The court reasoned that damages actions would not sufficiently deter illegal searches given the Supreme Court's then prevailing holding in *Wood v. Strickland*[31] that school officials are immune from such actions unless they act in violation of settled law or in a malicious manner.[32] Finally, the court found that it would be anomalous for school officials to be any less subject to an effective remedy for unconstitutional searches in light of their status as educators and role models.[33]

In *Smyth v. Lubbers*,[34] another federal court ruled that the exclusionary rule is applicable to public college disciplinary proceedings. In addition to noting the deterrent effect of the exclusionary rule and its role in preserving the legitimacy and integrity of the government as a rule enforcer, the court emphasized the fact that the punishment at a disciplinary hearing often is more severe than that which would be imposed if the same matter were handled in a criminal court.[35]

In *Gordon J. v. Santa Ana Unified School District*,[36] the California Court of Appeals recently held that the exclusionary rule does not apply to school disci-

---

[27] *Id.* at 494, 216 S.E.2d at 591.

[28] 499 FSupp. at 238.

[29] *Id.* at 237.

[30] *Id.* at 238–39.

[31] 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

[32] 499 FSupp. at 238. *But see* Harlow v. Fitzgerald, 457 U.S. 800, 815–18, 102 S.Ct. 2727, 2739–41, 73 L.Ed.2d 396, 408–10 (1982).

[33] *Id.* at 239; Caldwell v. Canady, 340 FSupp. 835 (N.D. Tex. 1972).

[34] 398 FSupp. 777 (W.D. Mich. 1975).

[35] *See also* Speake v. Grantham, 317 FSupp. 1253, 1267 (S.D. Miss. 1970), *aff'd*, 440 F2d 1351 (5th Cir. 1971) (exclusionary rule is applicable to search by part-time campus security officer).

[36] 162 Cal. App. 3d 530, 208 Cal. Rptr. 657 (1984).

plinary proceedings. In reaching this conclusion, the court was influenced by recent California cases holding that in other quasi-criminal proceedings, such as state bar disciplinary proceedings and parole revocation hearings, the exclusionary rule is inapplicable. In balancing the competing interests involved in the school setting, the court concluded that the social cost in harm to other students from the presence of contraband and the damage to morale of students, teachers, and administrators outweighs the value of any possible deterrent effect from employing the exclusionary rule.

The California court added two important caveats to its basic decision in *Gordon J.* First, it distinguished primary and secondary school searches from searches in the college setting, suggesting that college student's privacy needs are greater because they reside on campus.[37] Second, the court stated that a different conclusion concerning the applicability of the exclusionary rule may be in order in a case involving an egregious violation of the Fourth Amendment.

In *Morale v. Grigel*,[38] the exclusionary rule was held to be inapplicable to college disciplinary hearings. Citing *U.S. v. Calandra*, the court reasoned that the exclusionary rule is not a constitutional right but a judicially created remedy to deter the abuse of Fourth Amendment rights.[39] The court also noted that the original purpose of the exclusionary rule was to prevent illegal searches from being sanctioned by *courts* through the use of illegally obtained evidence.[40] Under this rationale the court rejected the application of the exclusionary rule to any action other than a full-blown criminal proceeding.

After ruling that the exclusionary rule is not constitutionally mandated, the court in *Morale* employed a balancing test to determine whether the rule should be applied in the court's discretion. Although acknowledging that inapplicability of the rule would leave no remedy for many unconstitutional searches because of the qualified immunity doctrine of *Wood v. Strickland*, the court found that the violation at issue was not flagrant or repeated and that it was unlikely that the school would conduct illegal searches in the future.[41] Thus, as in *Gordon J.*, the court left the door open for application of the rule to serious constitutional violations.

Prospects for Application of the Exclusionary Rule By the Supreme Court

The Supreme Court appears to be sharply divided on the question of whether the exclusionary rule should apply to school searches. Although the issue was not reached in *T.L.O.*, the majority criticized the New Jersey Supreme Court for "[d]eclining to consider whether applying the rule to the fruits of searches by school officials would have any deterrent value."[42] The three dissenting justices indicated that they would find the exclusionary rule to be applicable, at least when the search resulted in a criminal trial or a delinquency adjudication. Justice Stevens, speaking for the dissenters, reasoned that when a defendant is subject to an illegal search by a school administrator:

---

[37] *Id.* at 542, n.6, 208 Cal. Rptr. at 665, n.6.

[38] 422 FSupp. 988 (D. N.H. 1976).

[39] *Id.* at 999, citing, United States v. Calandra, *supra*, at f.n. 26.

[40] 422 FSupp. at 999, *citing*, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

[41] 422 FSupp. at 1001.

[42] ___ U.S. at ___, 105 S.Ct. at 738, 83 L.Ed.2d at 727.

> the application of the exclusionary rule is a simple corollary of the principle that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court" . . . Schools are places where we inculcate the values esential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly. The application of the exclusionary rule in criminal proceedings arising from illegal school searches makes an important statement to young people that "our society attaches serious consequences to a violation of constitutional rights" and that this is a principle of liberty and justice for all.[43]

Other Supreme Court rulings concerning the exclusionary rule do not provide any clear guidance on how the Court ultimately might resolve this issue. The weight of lower court authority favors a finding that the exclusionary rule applies to the fruits of school searches offered in judicial proceedings. The purposes of the rule as enunciated in *Mapp v. Ohio*,[44] to deter illegal invasions of privacy and to avoid convictions based on illegally obtained evidence, apply with equal force to searches in the school setting.[45] In addition, an argument can be made using Supreme Court precedent that the exclusionary rule is applicable to school disciplinary proceedings. The Court already has made clear that the exclusionary rule does not apply only to full-blown criminal trials.[46]

On the other hand, Supreme Court cases can be marshalled for the argument that the exclusionary rule is not applicable to school searches in both the judicial and disciplinary hearing contexts. In fact, the current trend of the Court is to find exceptions to the applicability of the exclusionary rule.[47]

In light of the Supreme Court's ruling in *T.L.O.* that the Fourth Amendment applies to searches by school officials, it is quite possible that the Court ultimately will apply the exclusionary rule in criminal proceedings resulting from school searches. A different approach to school disciplinary proceedings could easily be justified. Given the recent trend to question the usefulness of the exclusionary rule, the Court might well conclude that the need to safeguard other students justifies the admissibility of illegally obtained evidence in informal hearings to suspend or otherwise discipline students.

SEARCHES OF PROPERTY ON SCHOOL PREMISES

Relevance of the Nature of Place Searched

The Supreme Court has held that the Fourth Amendment protects a person when he has a reasonable expectation of privacy in a particular place. In the

---

[43] *Id.* at 760–61, 83 L.Ed.2d at 755–56, *quoting* Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); and Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

[44] 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

[45] *See also* Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) (exclusionary rule applies to illegal search by fire officials).

[46] One 1958 Plymouth Sedan, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965) (exclusionary rule applicable to "quasi-criminal" forfeiture proceedings).

[47] Walter v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed.2d 503 (1954) (exclusionary rule inapplicable to use of evidence to impeach defendant); United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 48 L.Ed.2d 561 (1974) (exclusionary rule inapplicable to grand jury proceedings); United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed. 1046 (1976) (exclusionary rule inapplicable to federal civil tax delinquency proceedings); INS v. Lopez-Mendoza, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984) (exclusionary rule inapplicable to deportation proceedings).

seminal case of *Katz v. United States*[48] the Court found that one can reasonably expect to be free from government intrusion when he places a call in a public telephone booth and, therefore, unauthorized bugging of the premises constitutes an unlawful search. On the other hand, all would agree that there can be no expectation of privacy when one speaks in a loud voice on a public street.

The Supreme Court in *T.L.O.* expressly left open the question whether students have a legitimate expectation of privacy in school storage spaces such as lockers and desks.[49] The *T.L.O.* opinion also failed to address the issue of the inspection of student cars or surreptitious surveillance of students in particular areas.

Surveillance Not Constituting a Personal Search

In *L.L. v. Circuit Court*[50] the Wisconsin Court of Appeals took the position that a student has a diminished expectation of privacy simply by being on school premises. The court reasoned that every student recognizes that his security depends upon the capacity of the school to maintain discipline and that "a certain amount of restraint upon the activities of the students . . . is assumed and expected by all students."[51]

This view of the student's reduced expectation of privacy recently was adopted by a Michigan federal district court, perhaps to the extreme, in *Stern v. New Haven Community Schools*.[52] In *Stern* school authorities had installed a two-way mirror in the boys' restroom. Using the mirror, an employee of the school observed the plaintiff buying marijuana from another student. The school suspended Stern for the balance of the semester and reported him to the police. Stern, claiming a violation of his Fourth Amendment rights, brought an action against the school under 42 U.S.C. §1983.

As a preface to its ultimate decision, the court in *Stern* specifically noted that the surveillance was conducted by school personnel, not police, and that no criminal action had been taken against the student. Then, applying the familiar balancing test, the court concluded that the student's privacy interest was subordinate to the school's duty to maintain order and discipline and that under the circumstances no Fourth Amendment rights had been violated. The court found that the limited view of the boys' restroom did not invade any protected zone of privacy of the student. Acknowledging, the school's and the community's legitimate interest in school discipline and the significant need to meet the problem of illegal drug use in the schools, the court stated:

> [W]hen [the] plaintiff's privacy interest is weighed against the defendants' duty to maintain order and discipline (so as to foster an educational environment) and to fulfill their responsibilities under the *in loco parentis* doctrine (so as to protect the health and welfare of plaintiff and all the students at New Haven High School), the facts herein neither support a Fourth Amendment violation nor present a case of a constitutional magnitude.[53]

---

[48] 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

[49] ___ U.S. at ___, n.5, 105 S.Ct. at 741, n.5, 83 L.Ed.2d at 732, n.5.

[50] 90 Wis. 2d 585, 280 N.W.2d 343 (1979).

[51] *Id.* at 600, 280 N.W.2d at 351.

[52] 529 FSupp. 31 (E.D. Mich. 1981).

[53] *Id.* at 37.

Search of Student Lockers

Students lockers frequently are the subject of school searches. Most courts have found that students have a diminished expectation of privacy in their lockers because the schools retain ultimate control over them.

According to established precedent, a search is always permissible if consent is voluntarily given by the individual whose person or property is subject to the search. Thus, if a student agrees to having his locker searched and if contraband is discovered, any later challenge of the search as being unreasonable will fail.

In the school context, there is an additional issue of whether the school authority can consent to a police search of a student's locker based on the school's joint control of the property. In *People v. Overton*,[54] the New York Court of Appeals implied that school authorities may consent to such a search. The school vice principal in *Overton* agreed to open a student's locker when police showed him a search warrant and told him they suspected the locker contained marijuana. It was later held that the search warrant was invalid. On remand from the United States Supreme Court, the New York court considered whether the vice principal's consent had been coerced. The vice principal had testified at trial that he would have inspected the locker regardless of who had reported that it contained an illegal substance. Based upon this testimony the court concluded the vice principal acted voluntarily in accordance with his official duties.

In a somewhat similar case, *State v. Stein*,[55] two police officers, who had no search warrant, asked a high school principal to open the locker of a student suspected of theft. With the student's consent, the principal opened the locker, and there the police found a key which led to the discovery of stolen property. While the case turned on the student's consent, in *dicta* the court suggested consent by the principal would have been sufficient. The court noted that the principal opened the student's locker "on his own judgment."[56] The court then added, "We deem it a proper function of school authorities to inspect the lockers under their control and to prevent their use in illicit ways or for illegal purposes."[57]

An exception to this dominant judicial view is the decision of the New Jersey Supreme Court in *State v. Engerud*,[58] a companion case to *T.L.O.* In this case, school authorities searched a student's locker, acting on an anonymous tip that the locker contained drugs and on a year-old rumor that the suspected student sold drugs at school. The search disclosed two plastic bags of methamphetamine and a package of marijuana rolling papers. Having completed the locker search, the vice principal confronted the student and asked him to empty his pockets. The pockets contained a small amount of marijuana and forty-five dollars in cash. The evidence was turned over to the the police and the student was charged with unlawful possession of a controlled substance and intent to distribute.

The student attempted to suppress this evidence at trial, but his motion was denied. On appeal, the decision of the trial court was reversed. The New Jersey

---

[54] 20 N.Y. 2d 360, 283 N.Y.S. 2d 22, 229 N.E.2d 596 (1967), *vacated and remanded*, 393 U.S. 85 (1968), *original judgment aff'd*, 24 N.Y.2d 532, 301 N.Y.S.2d 479, 249 N.E.2d 366 (1969).

[55] 203 Kan. 638, 456 P.2d 1 (1969), *cert. denied*, 397 U.S. 947, 90 S.Ct. 966, 25 L.Ed.2d 128 (1970).

[56] *Id.* at 640, 456 P.2d at 3.

[57] *Id.*

[58] 94 N.J. 331, 462 A.2d 934 (1983), *rev'd on other grounds*, 105 S.Ct. 733.

Supreme Court rejected the trial judge's view that the search was "responsible and diligent." Instead, applying the reasonable suspicion standard, the court found inadequate cause for the locker search. In the court's opinion, there was neither a reliable informer nor sufficient corroboration to support the search. Furthermore, the court held that the student retained an expectation of privacy in the contents of his locker in the absence of a school policy of regularly inspecting student lockers.[59]

All of the locker search cases discussed thus far have involved the search of individual lockers rather than a general examination of all school lockers. While no case has been found which addresses the issue directly, the cases cited indicate that schools will be permitted to conduct general inspections of lockers where the purpose is strictly to detect a health or safety problem or a violation of school rules. This type of inspection is comparable to the administrative search approved by the Supreme Court in *Camara v. Municipal Court of San Francisco*,[60] a case upholding a general search of a city dwelling for housing code violations.

Recent cases show that courts will accord school officials less discretion in conducting general searches of student lockers when the purpose of the search is to discover illegal substances. A general examination of cases involving the use of drug-detecting dogs to sniff student lockers illustrates this heightened judicial scrutiny.

In *Zamora v. Pomeroy*,[61] sniffer dogs searching for narcotics were walked from locker to locker. One of the dogs alerted to the locker of Vidal Zamora. His locker was opened and marijuana was found inside. Zamora brought suit to challenge the inspection of his locker without his permission and without a warrant and alternatively argued that it was unlawful to use sniffer dogs to discover the drugs.

Despite the involvement of the police as initiators of the investigation and as handlers of the dogs, the court upheld the search. The court considered the retention of control of the lockers by the school district to be crucial. It specifically noted that the school policy on lockers was published in the student handbook and that a copy was given to each student. The policy provided that student lockers remained under the jurisdiction of the school and that the school reserved the right to inspect all lockers at any time, notwithstanding the fact that the lockers were assigned to the individual students who assumed full responsibility for the security of their lockers. Given this published policy, the court concluded: "Inasmuch as the school district had assumed joint control of the locker, it cannot be successfully maintained that the school did not have a right to inspect it."[62]

Despite this strong language, the Zamora decision is ambiguous about the grounds necessary for searching a student's locker. Even though the use of the dog was part of a general investigation of the area surrounding all the lockers in

---

[59] The *Engerud* case was not appealed, as the student died of injuries received in an accident. However, in light of this case and others, school authorities might be well-advised to adopt a policy establishing joint control of school lockers and the right to inspect them. *See also* In re W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973), in which a California appellate court also applied a Fourth Amendment "reasonableness" test to locker searches. Without addressing the issue of joint control, the court summarily found that there was adequate cause for the search based upon an uncorroborated tip by other students.

[60] 387 U.S. 523, 87 S.Ct. 1754, 18 L.Ed.2d 905 (1967).

[61] 639 F.2d 662 (10th Cir. 1981).

[62] *Id.* at 670.

Zamora, the court noted that no locker was examined until after the dog alerted to it three times. Alluding to this multi-stage investigation, the court applied the "reasonable suspicion" standard to the administrative search of Zamora's locker and indicated that the search was legal "once the probability existed that there was contraband inside of the locker."[63] Although the court did not comment directly upon the legality of the use of the dogs, it can be inferred that the dog's alert provided a valid means of securing the requisite "reasonable suspicion" for the subsequent administrative search.

The only other case that has directly addressed the use of drug sniffing dogs as a precursor to a subsequent administrative search of school lockers, *Horton v. Goose Creek*,[64] likewise upheld the use of the dogs for this purpose. However, unlike the *Zamora* court, the federal appeals court in *Horton* posed the additional question of whether the dogs sniffing, in and of itself, constituted a search. If denominated a search, "reasonable suspicion" would be required to exist before the dogs could be used.

The court analyzed this threshold issue by considering whether the dog's sniffing offends reasonable expectations of privacy and whether the degree of intrusiveness could be tolerated in a free society. It noted that the majority of criminal courts had held that sniffing of *objects* was not a search, with only a Ninth Circuit remaining in disagreement.[65] The court cited with approval the Fifth Circuit's decision in *U.S. v. Goldstein*[66] that no search occurred when a dog sniffed luggage in an airport.

The Horton court also found persuasive the doctrine of "public smell," which provides that there can be no expectation of privacy and thus no Fourth Amendment protection for aromas emanating from property or persons exposed to the public. It further concluded that the dog merely aided or enhanced the investigator's olfactory senses in the same way that a flashlight enhances sight.

Because it held that the dog sniffing was not a search, the court did not need to address the reasonableness of the use of the dogs to sniff lockers. However, it remanded the case for a finding on the reliability of the dogs and for a determination of whether the reaction of the dog, in and of itself, provided adequate cause for a subsequent administrative search of the lockers.

The Fifth Circuit's position in *Horton* recently has received indirect support from the United States Supreme Court. In *United States v. Place*[67] the Court reviewed the reasonableness of a police search of luggage in a municipal airport. The search was preceded by a sniff and alert by a drug-detecting dog. The search, conducted ninety minutes after the defendant's luggage had been detained, uncovered a large quantity of cocaine. The defendant was indicted for possession with intent to distribute and sought to have the evidence of the cocaine excluded. The district court denied the defendant's motion and the Supreme Court reversed. The Court found that the 90-minute detention of the luggage without probable

---

[63] *Id.*

[64] 690 F.2d 470 (5th Cir. 1982), *withdrawing opinion* at 677 F.2d 471 (5th Cir. 1982), *reh'g denied*, 693 F.2d 524 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207, 103 S.Ct. 3536, 77 L.Ed.2d 1387 (1983).

[65] 690 F.2d at 476, *citing* U.S. v. Beale, 674 F.2d 1327 (9th Cir. 1982) and U.S. v. Solis, 536 F.2d 880 (9th Cir. 1976).

[66] 635 F.2d 356 (5th Cir. 1981), *cert. denied*, 452 U.S. 962, 101 S.Ct. 3111, 69 L.Ed.2d 972 (1981).

[67] 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 46 (1983).

cause violated the Fourth Amendment. In addition, while the issue was not presented by either party, the Court held that a canine sniff is not a search where personal luggage is sniffed in a public place by a trained dog.

In summary, the *Zamora* and *Horton* decisions, bolstered by the Supreme Court's opinion in *United States v. Place*, indicate that drug-detecting dogs may be used in a school setting to sniff the areas surrounding lockers and that these activities do not constitute a search. However, these cases suggest that once the dog has pinpointed a particular locker, the opening of that locker and the examining of its contents by school officials *is* a search requiring "reasonable suspicion."

School authorities would be well-advised to avoid challenges to locker searches by adopting policies making student lockers subject to search and publishing these policies in the student handbook. This approach may quell *Engerud*-style arguments that students maintain an expectation of privacy in their lockers. It also should obviate the need to use drug-detecting dogs in an effort to establish reasonable suspicion.

Automobiles Parked on School Premises

In accord with the Fifth Circuit's decision in *Horton*, a Florida court in *State v. D.T.W.*[68] held that no showing of cause is needed to justify patrolling student parking lots or inspecting the outside of cars. In this case, during a routine patrol, a teacher's aide discovered drug paraphernalia on the seat of a student's car. The car was opened and drugs were found. The court held that reasonable suspicion is necesssary to search the *interior* of a car. However, the discovery of the drug paraphernalia in plain view through the car window supplied reasonable suspicion to search the interior of the car.

In contrast, a Texas federal court in *Jones v. Latexo Independent School District*[69] held that the use of sniffer dogs to smell the exterior of cars must be based on reasonable suspicion. The court in *Jones* refused to categorize the use of sniffer dogs as falling within the "plain view" doctrine which permits officials to seize contraband that they notice in open view during the course of their normal duties. The court analogized the use of sniffer dogs to electronic surveillance, finding that both techniques do not merely enhance the power of human senses but detect things outside the range of human perception. In light of the Supreme Court *dicta* in *Place* that a sniff of an object in a public place is not a search, the continued vitality of the Jones requirement of reasonable suspicion for automobile sniffing by canines is doubtful.

INDIVIDUALIZED SUSPICION

Personal Searches

The most controversial area in the law on search and seizure in the schools today is the law regarding search of the student's person. The typical case is one in which, either through personal observation or a tip from a student informant, a school official suspects that a particular student is carrying an illegal substance. The student is taken to the principal's office, asked to empty his or her pocket

[68] 425 So.2d 1383 (Fla. App. 1983).

[69] 499 FSupp. 223 (E.D. Tex. 1980).

or purse, and the contraband is discovered. Even though students have a reasonable expectation of privacy in their person, courts permit such limited searches where the school employee's suspicion is reasonable.

The focus of the controversy is not on such relatively benign cases, but on the increasing number of cases involving mass searches of large groups of students for the purpose of discovering stolen property or illegal drugs and drug paraphernalia. In *T.L.O.* the Supreme Court expressly noted that it was not deciding whether individualized suspicion is an essential element of the reasonableness standard for school searches. It indicated that individualized suspicion is not an "irreducible requirement" of the Fourth Amendment and that exceptions have to be made where:

> the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field.' (citation omitted)[70]

In *Kuehn v. Renton School District No. 403*,[71] a case decided days before *T.L.O.*, the Washington Supreme Court invalidated a mass search of students participating in an overnight school band trip. School officials had established a practice of requiring students to submit to a predeparture search of their luggage because two students had been caught with liquor in their hotel rooms on a previous trip. The student-plaintiff and his parents objected to the luggage search. The student arrived for the trip with a locked suitcase and a note from his mother stating that she had searched the bag and that it contained nothing illegal. Nonetheless, the student was not allowed to go on the band trip because of his refusal to submit to a search.

Applying a "reasonable belief" standard, the Washington court held that the school's search violated the Fourth Amendment because it was not supported by individualized suspicion. The court also noted that the fact that the trip was voluntary and the search was conducted by band booster parents did not make the search constitutional where the event was school-sponsored and the parents' participation was school-sanctioned.

One particularly egregious mass search case is *Bellnier v. Lund*,[72] a New York federal district court case that involved the disappearance of three dollars in a fifth grade classroom. In *Bellnier*, the patience of school officials apparently had worn thin since there had been previous instances in which students had lost money, lunches and other items in the same class. In an effort to find the money, teachers first inspected the children's coats, then instructed the students to empty their pockets and remove their shoes. When the money still had not been found, the teacher marched the children to their respective restrooms and conducted a strip search of every child. Based on the Fourth Amendment's prohibition against arbitrary invasions by government officials, the court held for the plaintiff in her §1983 action against the school, finding the search invalid because the teachers failed to narrow their examination to specific suspect children.

While the court in *Bellnier* had no trouble invalidating the general search of fifth graders for lost money, it suggested in *dicta* that it might have reached a different result if the search had been aimed at discovering concealed drugs. The

---

[70] ___ U.S. at ___ n.8, 105 S.Ct. at 744, n.8, 83 L.Ed.2d at 735, n.8.

[71] 103 Wash. 2d 594, 694 P.2d 1078 (1985).

[72] 438 FSupp. 47 (N.D.N.Y. 1977).

court indicated that the presence of drugs introduced a much greater risk and implied that the school officials might, under such circumstances, be warranted in conducting a general search.

Use of Drug-Detecting Dogs

Several courts recently have explored the issue left unanswered by *Bellnier*—whether general seaches for illegal drugs are constitutional—and have reached different results. The first case, *Doe v. Renfrow*,[73] involved an Indiana school board that, in response to reports of drug abuse in its schools, authorized the use of drug-detecting dogs in a general search of 2,780 junior and senior high school students. The search was conducted by police officers and trained dog handlers who agreed prior to the search that no criminal charges would result. The entire search lasted three hours. By the end, the dogs had "alerted" to fifty students. These students were asked to empty their pockets or purses. The dogs continued to alert to eleven of these students; of these eleven, five high school students were subjected to thorough, clothed body searches and four junior high girls were strip searched. None of the body searches disclosed evidence of drugs.

The plaintiff in the *Renfrow* case, a thirteen-year-old girl, was one of the junior high students who was strip searched following the dog's repeated alerting. Some time after the search, the reason for the canine's persistence became obvious—on the morning of the inspection, the plaintiff had been playing with her dog which was in heat. The plaintiff brought an action against school officials, the police chief and the dog's trainer for damages and declaratory relief. The federal district court dismissed the action against the police chief and the dog trainer, leaving only those who participated in the strip search as defendants.

In its decision affecting the school defendants, the court found that the general inspection of the school for drugs and the sniffing of each student by the dogs were reasonable in light of the school's *in loco parentis* responsibilities.

Relying on related criminal cases, the court upheld the sniffing by a trained narcotic detecting canine. It adopted the rationale that a "sniff" is not a search and that the dogs are merely an aid to school administrators in detecting the scent of marijuana. The court held that the same reasonableness test applied both to the search of objects and to the search of persons, and that the students did not have an expectation of privacy which would preclude a school administrator from using drug-detecting dogs to sniff the area around school desks. As the court stated: "a public school student cannot be said to enjoy any absolute expectation of privacy while in the classroom setting."[74]

The court in *Renfrow* acknowledged that in many of the criminal cases, the law enforcement officers possessed independent information or "tips" concerning the whereabouts of drugs later sniffed out by the dogs. However, it found that the extensive list of prior drug incidents in the school (thirteen within the twenty days before dogs were used), the evidence of students refusing to speak for fear of reprisals, and the frustration of the administration in dealing with the problem constituted independent evidence indicating drug abuse within the school which justified the searches conducted.

---

[73] 475 FSupp. 1012 (N.D. Ind. 1979), *aff'd*, 631 F2d 91, *reh'g denied*, 635 F2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981).

[74] *Id.* at 1022.

The court held that the use of dogs to detect drug possession generally was permissible even where there existed no basis to suspect any individual student. It found that school officials may rely on "general information" to justify use of the canines to detect narcotics. Hence, the "independent evidence" and the "alert" by a reliable dog, in combination, sufficiently sustained the administrative search of the students' pockets and possessions. The court held only the "strip search" of students to be unreasonable on the theory that the dog's alert alone did not provide sufficient cause when the search involved so severe an intrusion.

The Renfrow case was appealed to the Seventh Circuit Court of Appeals which affirmed the lower court decision on all substantive points and remanded on the issue of damages. The case did not stop with one appeal, however. The plaintiff first sought a rehearing by the circuit court, and although the rehearing was denied, four of the judges dissented. One judge appeared to speak for all four in criticizing the decision to uphold the validity of a blanket search. His dissent was unyielding: "No doctrine of *in loco parentis* or diminished constitutional rights for children in a public school setting excuses this alarming invasion by police and school authorities of the constitutional rights of thousands of innocent children."[75] The judge further argued that the intrusive probings by the dogs unquestionably amounted to a search governed by Fourth Amendment protections.

Doe v. Renfrow was appealed to the Supreme Court in May of 1981. Again, the request to be heard was denied, but not without dissent.[76] Justice Brennan strongly objected to the "dragnet inspection" conducted in *Renfrow*. While recognizing the school's responsibility to maintain a "safe and healthful environment," he concluded that "[t]he problem of drug abuse in the schools is not to be solved by conducting schoolhouse raids on unsuspecting students absent particularized information regarding drug users or suppliers."[77] Justice Brennan agreed with the dissenters on the Seventh Circuit that the use of drug-detecting dogs did constitute a search. Furthermore, he argued that once the police became active participants in the drug raid, their actions and those of the school officials had to be judged by probable cause standards.

While *Renfrow* was being decided by the Seventh Circuit, a federal district court in Texas was considering the similar case of *Jones v. Latexo School District*.[78] Unlike the *Renfrow* case, the searches in *Jones* were conducted without the aid of the police, no strip searches were performed and the surveillance included sniffing the outside of all students cars. Also in contrast to *Renfrow*, the three plaintiffs in *Jones* were all found to have contraband or drug paraphernalia within their control. The students were suspended for three days and lost three points from their quarter grades for each day missed, causing one of the plaintiffs to fail his senior year.

The court in *Jones* agreed with the *Renfrow* dissenters, finding that school searches using dogs must be supported by individualized suspicion. Because the school system could not present evidence that any of the students were suspected in advance of possessing drugs or other contraband on school grounds, the court invalidated the challenged searches.

---

[75] 635 F.2d at 582.

[76] 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981).

[77] *Id.* at 1022, 101 S.Ct. at 3016, 69 L.Ed.2d at 395.

[78] 449 F.Supp. 223 (E.D. Tex. 1980).

In 1982 the Fifth Circuit decided *Horton v. Goose Creek Independent School District*,[79] which synthesizes to a degree the determinations of the courts in *Renfrow* and *Jones*.[80] The *Horton* court followed the *Renfrow* analysis in holding that the use of canines to sniff the exteriors of lockers and automobiles was not a search, but did not extend the *Renfrow* rationale to the sniffing of students. Instead, the Fifth Circuit adopted the reasoning set forth in *Jones* that a sniff of students is a search that must be supported by individualized suspicion.

In *Horton*, the named plaintiffs were subjected to sniffing by trained dogs. Two of the students triggered alerts. School officials questioned one student, took her purse and searched it without her consent. The officials discovered no contraband. The other student was asked to empty his pockets, which he did. When nothing was found, the school officials searched his socks and lower pant legs but again found no contraband.

The students filed suit alleging that the actions of the school officials violated the Fourth Amendment prohibition against unreasonable searches and seizures and the Fourteenth Amendment prohibition of deprivations of liberty and property without due process.

The Fifth Circuit concluded that the sniffing of objects by dogs is not a search, but found the sniffing of students themselves to be a search worthy of Fourth Amendment protection. Under the theory that dogs merely enhance human perceptual abilities, the court concluded that the sniffing of lockers and cars was not a search. However, the court held that the sniffing of the students was a search because a student retains a reasonable expectation of privacy in his person that is violated by the dog's technique of intentional, close-proximity sniffing of each subject, putting its nose on the person as well as manifesting other signs of excitement in the case of alert.

Thus far the Supreme Court has declined to consider the validity of using drug-detecting dogs for "dragnet" searches in the schools. The issue was not presented in *New Jersey v. T.L.O.* and the Court previously denied *certiorari* in *Renfrow* and in *Horton*. School districts must, therefore, be guided by the disparate determinations of the courts in *Renfrow*, *Jones* and *Horton*. While *Renfrow* holds that the use of the canines is not a search and *Jones* holds to the contrary, *Horton* takes the position that the same dog, exhibiting the same characteristics may or may not be engaged in a search depending upon *what* is being sniffed. Given that the Supreme Court has decided that a canine sniff of luggage in an airport is *not* a search,[81] and that no criminal court has held that canine searches may be extended to persons,[82] it appears the *Horton* analysis is the most consistent with prevailing judicial opinion.[83]

---

[79] 690 F2d 470 (5th Cir. 1982), *withdrawing opinion* at 677 F2d 471 (5th Cir. 1982), *reh'g denied*, 693 F2d 524 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207, 103 S.Ct. 3536, 77 L.Ed.2d 1387 (1983).

[80] See notes 73 and 78 above.

[81] U.S. v. Place, 462 U.S. 696, 103 S.Ct. 2627, 77 L.Ed.2d 110 (1983).

[82] *Accord* U.S. v. Bronstein, 521 F2d 459, 465 (2nd Cir. 1975), (Mansfield, J., concurring), *cert. denied*, 424 U.S. 918.

[83] *Jones*, a federal district court decision from within the Fifth Circuit, was not overruled by *Horton*, a later case decided by the Fifth Circuit. However, the continued vitality of the *Jones* holdings must be tempered greatly by the later circuit court decision in *Horton*.

Metal Detectors and Urinalysis

As drugs, weapons and other contraband on school grounds become more prevalent and school systems implement more drastic measures to combat these serious problems, the need for individualized suspicion will become an even more important issue in school searches. For example, in December of 1985 the Detroit Board of Education voted to purchase 45 airport-style metal detectors for use in most of the city's high schools to combat a rising tide of serious assaults and murder in the schools. However, a federal judge has temporarily enjoined the Detroit School System from using metal detectors or random pat down searches.[84] The use of metal detectors has been upheld in airports and in other public places on the theory that people voluntarily subject themselves to these searches, an analysis that probably is untenable in the Detroit case since public school attendance is compulsory.

Another increasingly common search technique is the use of urinalysis tests to detect the presence of drugs. Recently, in an unreported decision,[85] a New Jersey court held mass urinalysis testing of students to be unconstitutional. In this case, the school system attempted to require all students to undergo urinalysis as part of a standard preadmission health examination. Despite the school system's assertions that the test was for health purposes and the results would not be used for any criminal prosecutions, the court enjoined the practice because of the lack of individualized suspicion.

An Arkansas federal court in *Anable v. Ford*[86] also invalidated the use of urinalysis even where school officials had reasonable cause to believe the particular students tested recently had consumed drugs. The district court found that the urinalysis test used could not distinguish when, within a three-week period, a person had consumed marijuana. For this reason the court concluded the tests were not probative of whether a student was under the influence of drugs while at school. Despite the individualized suspicion, the court held that the urinalysis tests could not provide an adequate basis for disciplining students. The court also implied that probable cause would be required to justify probative urinalysis testing because of the physical intrusiveness of the procedure.

Most recently, in February 1986, a federal court in Washington, D.C., struck down a urinalysis program involving all transportation department employees of the District of Columbia public school system.[87] In the summer of 1984 the school system adopted a program requiring all transportation employees to submit to urinalysis testing as a result of increased evidence of drug use among the employees. In response to plaintiff's motion for summary judgment, the school system showed that the program was initiated because of a significant increase in traffic accidents and absenteeism and the discovery of syringes and bloody needles in restrooms frequented by transporation employees. An employee discharged for testing positive challenged her dismissal as being based upon an unreasonable search. Applying a probable cause standard the court held that the

---

[84] Jane Doe v. Board of Education, No. 85–4256 (E.D. Mich.). In April of 1986, the court upheld on its face a new code of student conduct which provides various changes in the search techniques employed, including prior notice.

[85] Odenheim v. Carlstadt-East Rutherford Regional School District, No. C-4305–85E, slip op. (N.J. Super. Ct., Ch. Div., Dec. 9, 1985).

[86] No. 84–6033, *slip op.* (W.D. Ark. July 12, 1985).

[87] Jones v. McKenzie, No. 85–1624, *slip op.* (D.D.C. 1986).

urinalysis of the bus attendant did constitute a search. The court went on to hold that the search violated the Fourth Amendment because of lack of individualized suspicion.

Many issues remain concerning the validity of these new search methods and their uses in the school setting. Conceivably the courts may hold, as some courts have found with respect to sniffer dogs, that these practices are not sufficiently intrusive to constitute searches. If they are deemed to be searches, it still is not settled whether individualized suspicion is a requirement for all searches of students by school officials. It is possible that courts will make a special exception to any individualized suspicion requirement for these techniques based upon their relatively unobtrusive nature, especially in schools where a serious weapon or drug problem exists. Challenges will be mounted against the reliability of any of these new techniques as they are employed in the schools. School officials likely will face difficult choices between limited school budgets and expensive but more reliable, technologically sophisticated tests and detectors.

STRIP SEARCHES

In addition to the mass search cases, "strip search" cases have received significant recent attention. These cases pose the question of whether some types of school searches cannot be justified even when grounded upon reasonable suspicion.

Although the Supreme Court's majority opinion in T.L.O. failed to address specifically the propriety of strip searches, the second prong of the reasonableness test enunciated by the Court provides some guidance on the permissibility of strip searches. The scope of the search must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[88] In his dissenting opinion in *T.L.O.*, Justice Stevens interpreted this language as "obviously designed to prohibit physically intrusive searches of students by persons of the opposite sex for relatively minor offenses."[89] Thus, the Court's apparent view is that strip searches should be reserved for serious offenses in which it is reasonably likely that contraband has been concealed on the student's body. If this interpretation is widely adopted, it is likely that strip searches of elementary students rarely will be upheld, given the nature of the infractions they are likely to commit and the relative infrequency with which such students possess dangerous contraband.

Lower courts have condemned the use of strip searches by school officials when not based upon reasonable suspicion. In the *Renfrow* case, *supra*, the Seventh Circuit allowed a recovery of monetary damages when a student was strip searched without reasonable suspicion. This decision can only be read as categorically invalidating strip searches of school children. Leaving little room for doubt, the court declared:

> It does not require a constitutional scholar to conclude that a nude search of a thirteen year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not

---

[88] ___ U.S. at ___, 105 S.Ct. at 744, 83 L.Ed.2d at 735.

[89] ___ U.S. at ___, n.25, 105 S.Ct. at 765, n.25, 83 L.Ed.2d at 761, n.25.

> only unlawful but outrageous under 'settled indisputable principles of law.' ... *Wood v. Strickland* accords immunity to school officials who act in good faith *and within the bounds of reason*. We suggest as strongly as possible that the conduct herein described exceeded the "bounds of reason" by two and a half country miles.[90]

In *M.M. v. Anker*,[91] the Court of Appeals for the Second Circuit affirmed a lower court decision that allowed a student to collect damages for the humiliation she suffered as a consequence of a strip search. Under the circumstances presented, the court found that the school lacked reasonable suspicion to conduct the search. The facts of *M.M.* demonstrate the more restrictive approach courts apply to the reasonable suspicion test in strip search cases. The student, who had a prior history of thefts at school, was found during a fire drill crouched behind a door with the purse of another student and several posters belonging to the school. The court rejected the school administrators' proffered justification that the strip search was necessary to determine whether the student had taken anything else, when the facts demonstrated that nothing else had been reported missing.

Having reached its decision, the court in *M.M.* went on to comment on the general propriety of strip searches. While not as damning as the Seventh Circuit in *Renfrow*, the court was by no means approving. The court proposed that a uniform standard of reasonableness for school searches may not be appropriate; that, as the intrusiveness of the search increases, the standard should approach the stricter probable cause requirement. Thus, while the Second Circuit would not advocate a complete ban on strip searches in schools, it would severely limit them.

This sliding scale approach to the quantum of suspicion required for a strip search also was advocated in *Bilbry v. Brown*.[92] As in *M.M.*, the court in *Bilbry* found that the reasonable suspicion test had not been met. The proffered justification for the strip search included a tip by a school bus driver that several days earlier she had seen one of the students carrying a paper bag concealed under his jacket, that the driver had seen the two students exchange something on the playground the morning of the search, that the older brother of one of the students previously had offered marijuana to another bus driver, and that there was a serious drug problem at the local high school which school officials were concerned would spread to the elementary school.

Other courts have approved the use of strip searches in the schools when based upon reasonable suspicion. In *People v. Scott D.*[93] school officials searched a student suspected of drug possession and found glassine envelopes containing heroin in the student's wallet. They then conducted a strip search to check for additional drugs. After deciding that the search was invalid from the start for lack of reasonable suspicion, the court took the opportunity to comment on strip searches in general. In the court's view, if the grounds for the search had been adequate and drugs had been found in a preliminary search, a strip search would have been permissible to ensure the student was not hiding other drugs.[94]

---

[90] 631 F.2d at 92–93.

[91] 607 F.2d 588 (2d Cir. 1979).

[92] 738 F.2d 1462, 1468 (9th Cir. 1984).

[93] 34 N.Y.2d 483, 315 N.E.2d 466 (1974).

[94] *See also* Bellnier v. Lund, 438 F.Supp. 47 (N.D. N.Y. 1977) (*dicta* that strip search would have been permissible if based upon reasonable suspicion).

In a more recent decision, *Rone v. Daviess County Board of Education*,[95] the Kentucky Court of Appeals, granting a motion for summary judgment by the school system, upheld the strip search of a high school student suspected of carrying drugs. The undisputed facts showed that three weeks before the search, Rone had given a prescription drug to two fellow students, causing one to feel dizzy and confused. In addition, the day before the search, Rone had given a small quantity of marijuana to two students on the school bus. The day of the search, Rone was questioned about the school bus incident and asked about his use of marijuana generally. He admitted to dispensing marijuana on the bus and to using it regularly himself. Upon these admissions, two male vice-principals asked Rone to lower his trousers and undershorts to determine if drugs or marijuana were concealed inside.

After reviewing these facts, the court of appeals concluded that the school search satisfied the reasonable suspicion standard, even though there was no direct evidence that the student was carrying drugs on the actual day of the search. In support of the school's position, the court noted: 1) the student voluntarily submitted to the strip search; 2) he never was touched offensively during the search; 3) the investigation was conducted without law enforcement officers present, and 4) no criminal charges were brought against the student subsequent to any of the drug related incidents. Contrary to the prevailing trend, the court relied on notions of *in loco parentis* and held that the school was empowered to formulate any rules necessary to promote the public good, "provided that such rules were neither arbitrary nor maliciously promulgated."[96]

In *Tarter v. Raybuck*,[97] the Sixth Circuit Court of Appeals stated in *dicta* that body cavity searches exceed the outer limits of reasonableness for school searches, even when the search is conducted to detect possession of "contraband in violation of school rules."[98] The facts of the case did not actually present such an extreme search. Tarter, a high school student suspected of possessing drugs, removed only his jacket, boots, and shirt at the direction of school authorities. He had been asked to remove his pants as well but refused to do so. The school search was then ended and the police were called. The court approved the search, finding that the school officials had reasonable suspicion. It did not address the issue of whether a more intrusive search short of a body cavity search, such as removal of the student's trousers, would have been justified.

POLICE INVOLVEMENT

The involvement of the police in school investigations is an important factor considered by the courts in judging the reasonableness of searches. When the school initiates a search and the police are not involved until contraband has been seized, courts have little difficulty upholding the search under the reasonable suspicion standard.[99] In fact, some courts have upheld searches based upon reasonable suspicion even when police are involved if it appears that the purpose

---

[95] 655 S.W.2d 28 (Ky. App. 1983).

[96] *Id.* at 30.

[97] 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 1749.

[98] 742 F.2d at 982.

[99] Tarter v. Raybuck, 556 FSupp. 625 (N.D. Ohio 1983), *aff'd in part, rev'd in part*, 742 F.2d 977 (6th Cir. 1984).

of the search is to enforce school disciplinary rules rather than to ferret out criminal evidence.[100]

Where the police use the fruits of school searches in criminal prosecutions, the lower courts are increasingly reluctant to validate the search. Thus, at one time, the courts applied the lesser reasonable suspicion standard to school-initiated searches conducted with police assistance, in effect bringing the police under the school's umbrella.[101] More recent cases have rejected this leniency, holding that such circumstances merit application of the stricter probable cause standard.[102]

Given the Supreme Court's emphasis in *T.L.O.* on the need for less stringent search standards in the school environment, the ultimate resolution of this issue is open to debate. A strong argument can be made that the relaxed standard accorded to school officials recognizes their special role and their motivation to look out for the children's interests, rather than merely to detect evidence of crime.

Picha v. Wielgos[103] illustrates the stricter judicial scrutiny applied when police are involved in school searches. This Illinois case involved a principal who had received a telephone tip that three female students had marijuana on school premises. On instructions from the school superintendent, he summoned the police. After the police arrived, school personnel searched the girls. In finding the search illegal, the court recognized the school's legitimate interest in the safety of the defendants and other students whom they might influence, but cautioned, "[A]ll [the school] can do in furtherance of that interest is to locate and perhaps confiscate the drugs."[104] When the school took the additional steps of calling the police, the purpose of the search was arguably expanded to discovering evidence of a crime, not merely to enforcing school rules. Under these circumstances, the court held the probable cause standard must be met.[105]

The view of the *Picha* court is not universally accepted. In *State v. McKinnon*[106] the police received an anonymous tip from an informant that certain students were selling amphetamines. The police conveyed the information to the school principal, who in turn conducted a search which produced the identified drugs. The students subsequently were convicted for possession of a controlled substance. Finding the search lawful since "the school official [had] reasonable grounds to believe the search [was] necessary in the aid of maintaining school discipline and order,"[107] the Washington Supreme Court upheld the conviction. To a claim that the police and the school principal acted jointly, the majority of the court responded that it found no evidence that the police chief directed or

---

[100] Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981). *But see* Note, *Use of Drug-Detecting Dogs in Public High Schools*, 56 Ind. L.J. 321, 336 (1981).

[101] *See, e.g.*, In re C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972); In re Boykin, 39 Ill. 2d 617, 237 N.E.2d 460 (1968).

[102] Picha v. Wielgos, 410 FSupp. 1214 (N.D. Ill. 1976).

[103] *Id.*

[104] *Id.* at 1220–1221.

[105] *Accord* Doe v. Renfrow, 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981) (Brennan, J., dissenting opinion); Piazzola v. Watkins, 316 FSupp. 624 (M.D. Ala. 1970), *aff'd*, 442 F.2d 284 (5th Cir. 1971).

[106] 88 Wash. 2d 75, 558 P.2d 781 (1977).

[107] *Id.* at 81, 558 P.2d at 784.

encouraged the principal to conduct a search. One of the court's brethren was not so easily convinced, however. In a biting dissent, the one justice argued that the school official "acted in conjunction with and as a agent of the police" and that under the circumstances the search should be governed by the probable cause standard.[108]

Among reported cases, the facts of *McKinnon* are rather unusual. In most of these cases the police have not directly enlisted the school's help to apprehend suspected criminals where they would not have sufficient grounds to do so on their own. Such a practice clearly subverts the Supreme Court requirement that police searches be based upon probable cause.

A final issue related to police involvement in school searches is whether searches by security guards hired by a school system should be governed by the more stringent probable cause standard applicable to searches by law enforcement personnel. Based upon the limited case law reported, it appears courts will treat school security officers like other school officials and apply the reasonable suspicion standard. Thus, in *In re Robert B.*,[109] a search by a "security officer" was scrutinized under the reasonable suspicion standard even though he was specifically authorized by California law to prevent violations of the law and to ensure the safety of students and faculty.[110]

CONCLUSION

Although the *T.L.O.* decision answers important questions concerning the constitutional requirements for searches of students by school officials in the public school setting, many issues remain unresolved. Strong arguments can be marshalled on both sides of many of these open questions. While it is recognized that the presence of drugs, weapons and other contraband in the schools pose difficult challenges to school administrators and teachers, school officials would be well advised to proceed with caution, particularly in the areas of strip searches, mass searches, and the use of dogs to sniff students.

Whenever possible school officials should be able to articulate a reasonable basis for a search, based upon objective information. The search will be more likely to be upheld as suspicion becomes more individualized and as the scope and intrusiveness of the search become more narrow and focused. The search should be no more generalized or intrusive than necessary, given the circumstances which necessitate the search.

In the many areas where questions remain, school officials initiating a search might do well to heed the advice of Supreme Court Justice Brennan:

> . . . [O]fficials who may harbor doubts about the lawfulness of their intended actions [should] err on the side of protecting citizens' constitutional rights . . .[111]

---

[108] *Id.* at 83, 558 P.2d at 785.

[109] 172 Cal. App. 3d 763, 218 Cal. Rptr. 337 (1985).

[110] *Accord* Speake v. Grantham, 317 FSupp. 1253 (S.D. Miss. 1970), *aff'd*, 440 F.2d 1351 (5th Cir. 1971) (search on college campus).

[111] Owen v. City of Independence, Missouri, 445 U.S. 622, 652, 100 S.Ct. 1398, 1416, 63 L.Ed.2d 673, 694, *reh. denied*, 446 U.S. 993, 100 S.Ct. 2979, 64 L.Ed.2d 850 (1980).

Handicapped Education: Recent Developments in the Law

by: Richard D. Kirk
Barbara D. Crowell

INTRODUCTION

The Education of the Handicapped Act (EAHCA) has recently been analyzed in various decisions. The focus of this analysis has been upon the scope of the Act as it relates to school programs. Within the last five years, the Supreme Court has decided three cases which aided in determining the scope of EAHCA. This article will discuss these cases and analyze the extent to which they provide guidelines for resolving the scope issue.

This article will next discuss the issue of handicapped placement in private institutions. The question is whether public educational agencies are obligated to fund such placement of the handicapped when they have the ability to provide the necessary care within the public school system.

Next, this article will discuss the issue of disciplining handicapped students. The important question is whether the student's handicap is somehow a cause of his misconduct. This discussion is followed by an analysis of due process issues. Of significance are the procedural violations which take place in handicapped cases, and the extent of their prejudice.

The article then discusses the subject of court appeals. This section will focus upon standards of review used by federal and state courts, and statutes of limitation used in the appeals process. The article will conclude with a brief discussion concerning infectious diseases and their implications for afflicted children who may require special placement.

THE SUPREME COURT SPEAKS

In 1982, the United States Supreme Court issued its first opinion in a case involving the Education for All Handicapped Children Act of 1975 (EAHCA). *Board of Education of Hendrick Hudson Central School District v. Rowley*.[1] In its initial foray into the area of handicapped education, the Supreme Court gave some guidance as to the requirements that must be met. As important as it was to have this first word from the Supreme Court, it was obvious that *Rowley* would not be the Court's last word.

On July 5, 1984, the final day of its term, the Supreme Court issued two important decisions in the area of handicapped education. In *Irving Independent*

[1] Board of Education v. Rowley, 458 U.S. 176 (1982).

School District v. Tatro,[2] the Court dealt with the issue of clean intermittent catheterization ("CIC") as a related service under the act. In *Smith v. Robinson*,[3] the Court dealt with the availability of attorneys' fees for prevailing parties in handicapped education litigation. These two decisions established some needed signposts in a generally uncertain terrain. Nonetheless, in each case the decision raised more questions than it answered.

Irving Independent School District v. Tatro

In *Irving Independent School District v. Tatro*, the Court was faced with an eight-year-old girl suffering from spina bifida. The student's condition was such that she needed CIC every three to four hours. During the relevant time period, the student was not able to perform the procedure herself. When the student was three and a half years old, her public school district agreed to provide her with special education. Her Individualized Educational Program (IEP) called for early childhood development classes and certain related services such as physical and occupational therapy. The IEP made no provision, however, for CIC. Her parents pursued the administrative remedies available to them. They obtained a ruling from a hearing officer that the Act required the provision of CIC. The Texas Commissioner of Education adopted the hearing officer's ruling, but the State Board of Education reversed, holding that the Act did not require the provision of CIC.

In the fall of 1979, the student's parents brought an action in federal district court based both on the Education of the Handicapped Act and the Rehabilitation Act of 1973 which sought an order that clean intermittent catheterization be provided to the student, plus damages and their attorney's fees. The trial court denied the parents' request for a preliminary injunction on the grounds that CIC was not a related service required to be provided under the Education of the Handicapped Act nor was it required by the Rehabilitation Act. The Fifth Circuit Court of Appeals reversed, holding that CIC was a related service under the Education of the Handicapped Act because without the procedure the student could not attend classes and benefit from the special education otherwise available to her. The appellate court also held that the school district's refusal to provide CIC had the effect of excluding her from a federally funded program in violation of the Rehabilitation Act.

The appellate court remanded for development of a more complete factual record. On remand, the federal district court held that CIC was not a "medical service" under the Education of the Handicapped Act, but was a "related service" under the Act. The court ordered the school district to include provision of CIC during school hours in the student's IEP. Moreover, the federal district court held that the parents had shown a violation of the Rehabilitation Act and that they were thus entitled to their attorney's fees. The Fifth Circuit Court of Appeals affirmed the trial court and the school district appealed.

In an analytically lucid opinion, the United States Supreme Court sided with the parents with respect to their claim under the Education of the Handicapped Act, but not the Rehabilitation Act. With respect to the Education of the Handicapped Act claim, the Court said that the issue was a simple one: Is CIC a related

---

[2] Irving Independent School District v. Tatro, 468 U.S. ___, 104 S.Ct. 3371, 3377, 82 L.Ed.2d 664 (1984).

[3] Smith v. Robinson, 468 U.S. ___, 104 S.Ct. 3371, 82 L.Ed2d 385 (1985).

service under the Act?[4] The answer to that simple question depends upon whether CIC is a supportive service required to assist a handicapped child to benefit from special education and whether the medical services exception is applicable to CIC. The Court dealt swiftly and decisively with the first of its subquestions, finding that CIC clearly was a support service required to assist a handicapped child to benefit from education. Given the clear congressional intent to make public education available to handicapped children, "services like CIC that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school." The second subsidiary question was more tricky, but the Court had no trouble resolving it. The Court turned first to the regulations promulgated by the Department of Education under the authority of the Education of the Handicapped Act and found that the definition of related services includes "school health services", further defined to include "services provided by a qualified school nurse or other qualified person." The term "medical services" is defined as "services provided by a licensed physician."[5] The Court held that these regulations were a reasonable interpretation of congressional intent. The Court rejected the school district's argument that CIC was a medical service because it could only be performed pursuant to a physician's prescription. Nurses in Texas were authorized to perform certain services for non-handicapped students in accordance with a physician's prescription without transforming the services into medical services. Thus the Court concluded that CIC should fit within the same category. Regarding the parents' claim under the Rehabilitation Act, the Court found for the school district and reversed the Fifth Circuit ruling upholding the trial court's award of attorney's fees under the Rehabilitation Act. The Supreme Court did so under the authority of *Smith v. Robinson*, discussed below.

Smith v. Robinson

On the same day it decided *Tatro*, the Court announced its decision in *Smith v. Robinson*. In that case, the Court was faced with a youngster suffering from cerebral palsy and other physical and emotional handicaps. His legal journey began in 1975 when he was placed by his public school district in a hospital day program. About a year later, his public school district announced that it would no longer pay for the placement because responsibility for such payment lay with another state agency. The student's parents appealed to the district's school committee and, in addition, filed a federal district court action under 42 U.S.C. §1983. In the federal district court action, the parents obtained injunctive relief requiring continued funding of the placement in the hospital day program.

Meanwhile, the case's journey through the state administrative process continued unsuccessfully for the parents. As a result of the state administrative process, the parents amended their federal district court complaint to allege various procedural violations and, for the first time, violations of the Education of the Handicapped Act. The federal district court certified to the Rhode Island Supreme

---

[4] Related services are defined in the Act as "transportation and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist the handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children. 20 U.S.C. § 1401(17).

[5] 34 C.F.R. § 300.13(a), (b)(10); 34 C.F.R. § 300.13(b)(4).

Court the question of responsibility for payment of the hospital day program placement among the various relevant public agencies. The state supreme court ruled that the responsibility lay with the public school district. The parents amended their complaint again, adding claims under the Equal Protection Clause and the Rehabilitation Act of 1973.

The federal district court found for the student's parents against both the local and state defendants. The local defendants agreed to pay a portion of the parents' attorneys fees, without prejudice to the parents' right to seek further payment from the state defendants. The trial court subsequently awarded the parents substantial fees and costs for time spent both in the administrative process and in the federal litigation. The United States First Circuit Court of Appeals reversed. The First Circuit ruled, first, that fees were not available under the Education for the Handicapped Act. Second, it ruled that the attorneys' fees provision of the Civil Rights Act, 42 U.S.C. §1988, could not be used to shift fees where the cause of action was grounded in a non-fee statute.

The Supreme Court's opinion in *Smith* is unfortunately dissimilar to its opinion in *Tatro*. It is illucid and splintered. The Court ruled against the parents' claim that they were entitled to fees under §1988. The Court stated that where, as here, the prevailing party has made a substantial but unaddressed constitutional claim, the court must examine the exact nature of the claims to determine whether or not fees will be allowed. The Court ruled that the exclusive avenue for raising Equal Protection claims regarding the right to a free appropriate public education is the Education of the Handicapped Act, and not an independent constitutional challenge. Accordingly, fees were not available for the parents' Equal Protection claims. Regarding the parents' procedural claims, the Court ruled that even if fees were available for such claims, the parents had not prevailed on their procedural claims and so were not entitled to fees in any event. The Court left open the door for procedural claims to be asserted, however, in proper circumstances.

With respect to §505 of the Rehabilitation Act of 1973, the court ruled that where a claim asserting discrimination under §504 is identical to a claim asserting violations of the EAHCA, a plaintiff may not rely upon the §504 claim as a basis for attorneys' fees where they are unavailable under the EAHCA.

Justice Brennan, joined by Justices Marshall and Stevens, issued a stinging dissent in which he criticized the majority's reading of congressional intent. Congressional reaction to *Smith* may well indicate whether or not Justice Brennan's criticism is accurate.

Burlington School Committee v. Department of Education

In its most recent decision on special education, the Supreme Court issued a decision almost a year ago in *Burlington School Committee v. Department of Education*.[6] There, the student in question had specific learning disabilities which had become apparent by the first grade. By the third grade, the student's IEP called for individualized tutoring by a reading specialist for one hour daily plus individual and group counseling. The school he was attending, however, only included grades K-3, so a new placement for the student was needed for the ensuing years. The school district and the student's parents disagreed as to the

[6] Burlington School Committee v. Department of Education, 471 U.S. ___, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).

exact nature of the student's problems and as to where the appropriate placement should be. The school district felt that the student's problems were mostly emotional, while the parents believed the source to be neurological.

The school district proposed a fourth grade placement in a highly structured class of six children. The parents challenged the proposed placement by initiating a due process hearing. After receiving an expert's evaluation which they believed showed the school district's placement to be inappropriate, the parents enrolled the student in a private school at their own expense. At the administrative hearing regarding the placement, the due process hearing officer found that the school district's proposed placement was inappropriate and that the parents' chosen school was the best placement within the confines of the record (it being the only other placement in the record). The school district appealed that decision to federal district court, naming the parents and the state as defendants.

There followed a long series of proceedings both in the federal district court and in the federal appellate court. As might be expected, a full school year passed without the matter being resolved. Although the school district agreed to begin paying for the private placement on an interim basis until the case was resolved, it refused to pay for the first year of such costs. One of the arguments subsequently advanced by the school district was that the district court could not award the parents reimbursement of their interim expenses connected with the student's private placement. In one of several interim appellate decisions, the court of appeals ruled that the parents were not precluded from seeking reimbursement for private school tuition and costs despite having placed their child in private school without the school district's consent. The school district sought and obtained review of that decision by the United States Supreme Court.

The first issue resolved by the Court was whether a trial court reviewing a due process hearing record is limited to awarding prospective relief, i.e., for school years after the case is resolved. Some lower courts had held that awarding reimbursement for tuition expenses was the same thing as awarding damages, something not permitted under the EAHCA. The Supreme Court held that Congress intended for trial courts to have the power to award retroactive reimbursement for tuition and costs by giving each such court the power to "grant such relief as [it] deems is appropriate." It stated explicitly that this was not the same thing as awarding damages. The Court then went on to hold that a unilateral placement does not bar parents from recovering reimbursement for tuition and costs. Rather, a unilateral placement puts the risk of choice on the parents: if the school district's preferred placement is ultimately found to be appropriate, the parents may not recover their interim placement expenses and costs; if, however, the parents are correct and it is ultimately found that the school district's preferred placement is inappropriate, then the parents may recover their interim expenditures. Thus, although the applicable laws mandate that handicapped students be allowed to remain in their status quo while future placements are challenged in administrative and judicial proceedings, parents have the right to change that status quo at their own financial risk. The decision resolved the conflict among the various courts as to interpretation of the status quo provisions of the EAHCA.

PRIVATE PLACEMENTS

Courts in the last few years have addressed a number of issues arising out of requests for public educational agencies to fund the placement of handicapped students at private institutions.

Need for Private Placement

The United States Supreme Court's decision in *Rowley* provided the basis for lower court decisions that a private placement, while perhaps offering a superior program, was not necessary in light of the school district's ability to provide an appropriate educational program in the public schools.

In *Hessler v. State Board of Education of Maryland*,[7] the parents of a handicapped seventeen-year-old sought reimbursement for the tuition costs of a private school which, they claimed, provided an educational program that was more appropriate than the public special education program offered to their daughter. Citing *Rowley*, the Fourth Circuit Court of Appeals held that a state receiving funds under the EAHCA was not required to provide services to maximize a handicapped child's potential but only had to offer sufficient support services to enable the child to benefit educationally from that instruction. The fact that one school may be more appropriate than another school did not make the less appropriate school inappropriate.

The Fourth Circuit in *Matthews v. Davis*,[8] found that a day-only program offered by the school district was reasonably calculated to enable a severely and profoundly retarded child to receive educational benefits in accordance with the standard established in *Rowley*. It affirmed the lower court's finding that a residential program the court had previously ordered was no longer required since evidence at the court hearing indicated that a continuation of the residential program would at best yield only marginal returns and probably none at all.

A request by parents of a severely handicapped teenage student in Ohio for a year-round placement was found by the Sixth Circuit in *Rettig v. Kent City School District*,[9] to reflect a difference of opinion as to the most effective teaching methods available and under *Rowley*, the court upheld the public school placement.

In a Delaware case, the parents requested that the school district fund the private residential placement in which the parents had unilaterally enrolled their daughter. The District Court of Delaware held that even though there was unrebutted evidence that the student's gains acquired from the private residential placement might be lost if that placement were changed, the program offered by the public school district which could confer education benefits on the student was sufficient.[10] The state need not provide the best education money can buy, nor most states maximize a handicapped child's potential.

Residential Placement

The *Ahern* case also addressed an issue frequently encountered in private residential placements, that of determining whether a residential placement must to be provided as a part of the child's free appropriate education or whether it is needed for reasons not related to education. The Ahern child was a trainable mentally retarded sixteen-year-old whose behavior at home and in the neighborhood had deteriorated when she entered adolescence. She talked loudly to

---

[7] Hessler v. State Board of Education, 700 F.2d 134 (4th Cir. 1983).

[8] Matthews v. Davis, 742 F.2d 825 (4th Cir. 1984).

[9] Rettig v. Kent City School District, 720 F.2d 463 (6th Cir. 1983), *cert. denied, and app. dismissed*, ___U.S. ___, 104 S.Ct. 2379 (1984).

[10] Ahern v. Keene, 593 F. Supp. 902, 906 (D. Del. 1984).

herself and to imaginary friends, withdrew into a fantasy world when moderately stressed, wandered away from home, talked to strangers, occasionally related in a bizarre and inappropriate manner, and twirled herself around in circles on sidewalks near her home and at shopping malls. A psychiatrist testified that she had exhibited no signs of severe depression or psychosis and explained that her problems could be traced to her home environment "which had only a 'limited capacity' to 'engage Alicia emotionally.'"[11] He believed that she still needed a residential program to provide more peer interaction and stimulation after the school day and a constant, safe, supportive structural environment.

While the public school staff had experienced the effect of Alicia's emotional difficulties in school, her social and emotional problems were not uncommon among students at the public school and specific programming was available there to handle those problems. The district court of Delaware relied on the standard established in *Kruelle v. New Castle County School District*,[12] decided before *Rowley*, that to determine whether a residential placement is educationally required, a court must analyze whether a residential placement may be considered necessary for educational purposes or whether the residential placement is a response to medical, social or emotional problems that are separable from the learning process.[13] The *Alecia* court found that Alicia's emotional problems, exhibited primarily in response to a stressful home environment, were separable from the learning process and that it had not been established that a residential program was necessary for the student to receive benefits from her educational program. Accordingly, the parent's request for a residential placement was denied.

The *Kruelle* standard has been applied in other court cases. In *Christopher T. v. San Francisco Unified School District*,[14] the Northern district court of California found that a residential placement was required for both of the students bringing the action to benefit from special education. One of the students in the action, a moderately retarded, schizophrenic child, had been placed in a residential program when he previously lived in New York and succeeding evaluations had emphasized the importance of a highly structured, nurturing environment. At the hearing regarding the other child, experts had testified that the child had a schizoid personality, was totally incapable of functioning in a normal home setting and was in need of residential treatment. Without specifically stating so, the Northern district court, applying the *Kruelle* standard, implied that both of the children's emotional and social needs were unseverable from their educational needs.

Likewise, the district court of Connecticut in *Papacoda v. State of Connecticut*,[15] held that a residential program was necessary for a child with emotional problems related to family turmoil to benefit educationally. Applying the *Kruelle* standard, the court ordered the public school district to provide room and board at an out-of-state residential institution at no cost to the parents. The state hearing officer had concluded that the defendants were not responsible for the room and board at the residential institution because the placement arose out of the need for services to treat the student's emotional problems rather than educa-

[11] 593 F Supp. at 906.

[12] 642 F2d 687 (3d Cir. 1981).

[13] *Id.* at 693.

[14] Christopher T. v. San Francisco Unified School District, 553 F Supp. 1107 (N.D. Cal. 1982).

[15] 528 F Supp. 68 (D. Conn. 1981).

tional problems. The district court of Connecticut disagreed, stating that all parties had conceded that the student could not be educated without a residential placement because the child's therapy program must be coordinated with the teaching program.

In Texas, the parents of a multiply handicapped child requested a twenty-four-hour year-round residential program for their child. The local school district contended that the student's needs could be met in a six-hour day program augmented by home support. The Southern district court of Texas, in *Gladys J. v. Pearland Independent School District*,[16] also applying the *Kruelle* standard, found the child's social, emotional, medical and educational problems were so intertwined that it was impossible for the court to separate them. The court expressed serious reservations about whether any six-hour day program augmented by a home support system could adequately provide the constant structured environment, the round-the-clock behavior modification and the intensive language program that the court believed should be part of any program to meet the child's needs. Thus, the local school district was ordered to provide a twenty-four-hour residential placement for the child.

The California Court of Appeals, First District, in *San Francisco Unified School District v. State of California*,[17] also citing the *Kruelle* case, found substantial evidence to support the hearing officer's finding that the child's emotional problems adversely affected his ability to learn and thus, interfered with his educational progress. The court also held substantial evidence existed to support the hearing officer's conclusion that a residential placement was necessary for the child to satisfactorily progress because of his need to escape his "emotionally-charged home environment." The court of appeals therefore concluded that the trial court below had erred in finding no substantial evidentiary support for the hearing officer's decision.

In *Doe v. Anrig*,[18] the First Circuit addressed a request by the parents of a child with Down's Syndrome for a continued residential placement. The child, then in his mid-teens, had been institutionalized since his birth. Finding that "the district court could fairly have concluded that forcing the child into an unreceptive, perhaps hostile, home environment after an entire lifetime of residential placement, would adversely affect his educational development," the First Circuit Court of Appeals stated that it could not find the district court's findings to be clearly erroneous and hence the district court's holding that a residential placement was necessary was affirmed.

When the school district failed to present any substantial evidence in support of its placement of a severely learning disabled and emotionally disturbed child in a day program and where credible witnesses familiar with the student testified about the need for a twenty-four-hour structured residential program, the district court of the District of Columbia in *Diamond v. McKenzie*,[19] concluded that the public school district should fund a residential program for the child.

The District of Columbia Circuit Court of Appeals was faced with a request for a residential program for a learning disabled student with emotional problems

---

[16] 520 F Supp. 869 (S.D. Tex. 1981).

[17] 182 Cal. Rptr. 525 (Cal. Ct. App. 1982).

[18] Doe v. Anrig, 692 F2d 800, 808 (1st Cir. 1982), *on remand on other grounds*, 561 F Supp. 121 (D. Mass. 1982), *overruled on other grounds*, 722 F2d 910, 917 (1st Cir. 1983), *aff'd*, 728 F2d 30 (1st Cir. 1984).

[19] 602 F Supp. 632 (D.D.C. 1985).

in *McKenzie v. Smith*.[20] Applying the *Rowley* test regarding whether a residential placement is appropriate, the court of appeals affirmed the district court's finding that the public school district failed to provide an appropriate program. The school district proposed placing the student in a learning disabled program at a public high school with at least twenty-five percent (25%) of his academic instruction being provided in regular education classes. The district court had determined that the student's educational and emotional needs could not be segregated. While the circuit court of appeals recognized that the evidence could support a contrary conclusion, it could not say that the district court's factual findings were clearly erroneous.

Even when parents and a school district agree that a residential placement is necessary, disagreements can arise over which residential program is appropriate. In *Clevenger v. Oak Ridge School Board*,[21] the Sixth Circuit Court of Appeals was faced with an action in which the parent of a seriously emotionally disturbed nineteen-year-old objected to the placement of her son by the public school district in a residential school that offers psychiatric counseling to all students. The court found that the school board had failed to present evidence that its proposed placement was appropriate. Expert testimony had established that the student needed a long-term placement in a secure, locked facility. The school board's proposed placement was generally a shorter-term facility and had no locked wards. Furthermore, the staff at the school board's proposed placement had said it did not want the student because he was not sufficiently cooperative to allow its program to work. In contrast, the placement requested by the student's mother offered long-term treatment, had locked wards, and was willing to take the student into its program. Accordingly, the Sixth Circuit reversed the decision of the district court and remanded the case for an order that the student be placed in the school which his mother had requested.

In a case with an unusual twist of circumstances, the parents of a physically handicapped second grade student with cerebral palsy opposed the school district's proposal to relocate the student to a school in another district to be taught by a special education teacher certified in physical disabilities. The parents wanted their daughter to remain in her neighborhood school which did not have a teacher certified in physical disabilities. Finding that the school district's proposal was reasonably calculated to furnish the child with an appropriate education, the Ninth Circuit Court of Appeals in *Wilson v. Marana Unified School District No. 6 of Pima County*[22] affirmed the district court's decision granting judgment on the pleadings to the school district.

Higher Standard Set By State Laws

While the *Rowley* decision established that federal law does not mandate that a school district maximize the potential of each handicapped child commensurate with the opportunity provided non-handicapped children, several courts have found that states have established higher standards which require them to provide greater benefits to handicapped children than the federal statute alone would necessitate. In *Geis v. Board of Education of Parsippany Troy Hills*,[23] the district

[20] McKenzie v. Smith, 771 F.2d 1527 (D.C. Cir. 1985).

[21] Clevenger v. Oak Ridge School Board, 744 F.2d 514 (6th Cir. 1984).

[22] Wilson v. Marana Unified School District, 735 F.2d 1178 (9th Cir. 1984).

[23] Geis v. Board of Education, 589 F. Supp. 269 (D.N.J. 1984), *aff'd*, 774 F.2d 575 (3d Cir. 1985).

court of New Jersey noted that a New Jersey statute establishes a more demanding standard than that set by Congress by requiring that a local public school district provide each handicapped pupil with a special education program and services according to how the pupil can best achieve educational success. While the court found that the program proposed by the public school board in the high school's program for the trainable mentally retarded would meet the floor established by Congress as set forth by the United States Supreme Court in its *Rowley* decision, the district court held that continued attendance at the residential school as requested by the student's parents would best enable the student to achieve success in learning and in obtaining the communication and work skills needed for him to achieve the highest obtainable level of development in accordance with state law.

A Michigan court has found that Michigan law establishes a higher standard for the educational programs offered to handicapped students. In *Woolcott v. State Board of Education*,[24] the Michigan Court of Appeals held that a public school district may be required to offer a cued speech interpreter for a hearing-impaired child to help her understand class materials under Michigan law which sets a goal to "develop the maximum potential of every handicapped person."[25]

In *David D. v. Dartmouth School Committee*,[26] the First Circuit affirmed the district court's decision that a comprehensive, twenty-four hour, highly structured program was essential to prepare a student with Down's Syndrome to return to the mainstream community. Such a program was deemed necessary to comply with Massachusetts law that requires the Department of Education to administer special education programs to assure the maximum possible development of a child with special needs, a level superior to that required under the federal statute.

One court recently, however, has held that a state statute, which required a school committee to "provide such type of special education that will best satisfy the needs of the handicapped child," does not impose a higher standard than the federal standard as established by the *Rowley* decision. Because that statute was originally adopted decades prior to the adoption of EAHCA and because all the state regulations promulgated under the statute since the federal EAHCA legislation was passed have incorporated the terminology of the EAHCA almost verbatim, the district court of Rhode Island in *Scituate School Committee v. Robert B.*[27] concluded that the Rhode Island legislature did not intend to create a right to an educational program greater than the federal right. The court noted that those states which had adopted a higher standard had done so through legislation which clearly indicated such an intent.

Transportation for Family to Residential Placement

In *Cohen v. School Board of Dade County, Florida*,[28] the parents of a child with severe psychiatric and emotional disorders sought reimbursement from the public school board for monthly visits with their son at a residential school in

---

[24] Woolcott v. State Board of Education, 351 N.W.2d 411 (1st Cir. 1985).

[25] Mich. Comp. Laws § 380.1701(a); M.S.A. § 15.41 701(a).

[26] David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985).

[27] Scituate School Committee v. Robert B., 620 F. Supp. 1224, 1233 (D.R.I. 1985).

[28] Cohen v. School Board, 450 So.2d 1238 (Fla. App. 1984).

Georgia. The parents lived in Florida. The school district had agreed to pay the expenses for three round trips made by the child between Florida and Georgia. The District Court of Appeals of Florida upheld the finding of the hearing officer that the school board had adequately met its obligation to provide funding for transportation by paying for the three round trips per year.

DISCIPLINE OF HANDICAPPED STUDENTS

The courts continue to require that before a handicapped student can be expelled, the school district must apply the procedures specified under EAHCA and determine whether the student's behavior resulted from his learning disability. In *School Board of the County of Prince William, Virginia v. Malone*,[29] the Fourth Circuit affirmed the district court's finding that the distribution of drugs by a fourteen-year-old learning disabled youth was sufficiently related to his handicapping condition to preclude expelling him although he could be otherwise disciplined or even suspended. The district court agreed with the state administrative officers that the student's learning disability prevented him from comprehending or giving long-term consideration to the consequences of his actions and resulted in a loss of self image and an awareness of lack of peer approval which made him particularly susceptible to being set up by peers engaged in drug trafficking. The Fourth Circuit held that the district court had applied the proper test in determining whether the student's behavior resulted from his learning disability. The school board had argued that the district court should have determined instead whether the student's behavior resulted from an inappropriate placement.

The Fifth Circuit followed the 1984 holding of the Eleventh Circuit in *Victoria L. v. District School Board of Lee County, Florida*,[30] and its 1981 holding in *S-1 v. Turlington*,[31] that under EAHCA, even though a handicapped child is generally to be kept in his most current educational placement pending resolution of administrative and judicial proceedings, a district may take measures in exercising their traditional disciplinary authority to insure a safe school environment. In *Jackson v. Franklin County School Board*,[32] the Fifth Circuit held that a seventeen-year old learning disabled student, who had been suspended from public school for sexually molesting a female student and subsequently committed to a state hospital for psychiatric evaluation and treatment, need not be readmitted to the public school placement pending the outcome of his IEP appeal. While the federal statute provides for maintaining a child in his most current educational placement, the Fifth Circuit recognized that schools have discretion to alter a handicapped student's placement and remove any student when he endangers himself or others or threatens to disrupt a safe school environment.

In *Lamont X v. Quisenberry*,[33] two students, one fifteen years old and the other twelve-years-old, both identified as severely behaviorally handicapped, had been involved in several episodes of disruptive or violent behavior. On the first day of the new school year, one of the students suddenly became angry while playing

---

[29] School Board v. Malone, 762 F.2d 1210 (4th Cir. 1985).

[30] Victoria L. v. District School Board, 741 F.2d 369 (11th Cir. 1984).

[31] 635 F.2d 342 (5th Cir. 1981), cert denied, 454 U.S. 1030.

[32] Jackson v. Franklin County School Board, 765 F.2d 535 (5th Cir. 1985).

[33] Lamont X. v. Quisenberry, 606 F. Supp. 809 (S.D. Ohio 1984).

a game with other students. He hit a student, kicked him, ripped his collar off his shirt, and threw books and a ruler around the classroom. Two days later, the other student refused to follow his teacher's directions, made some threatening remarks, picked up a baseball bat and began striking, throwing, and destroying objects in the classroom. Both students were removed from the classroom out of fear that they might harm others. The school district instead offered one hour of home-bound instruction to the students. On a motion by the students for a preliminary injunction, the Southern district court of Ohio found that taking a child from the classroom and instead providing home-based tutoring constituted a change in placement. The court concluded that a sufficient "emergency" did not persist in the two cases to justify the continued long-term exclusion of the students from their classroom. The court urged the parties to develop an alternative placement that provided classroom instruction among the students' peers and with substantial psychological assistance. If no better alternative were generated, it would order the students to be returned to their classrooms. In a footnote, the court stated that it was troubled by the decision to criminally prosecute the students for the disturbances. It observed that the students' handicap by definition included a likelihood for behavioral disturbances and that a criminal prosecution did not appear to be in keeping with the spirit and purpose of the EAHCA.

DUE PROCESS

Procedural Violations

The refusal of the hearing officer to swear witnesses was found in *Alexa v. Keene*,[34] not to violate the plaintiffs' due process rights. The federal and state regulations in 1981 did not require witnesses to be under oath at the due process hearing. Upon reviewing the transcript, the court found that the plaintiffs suffered no prejudice from the failure to swear witnesses.

The Tenth Circuit Court of Appeals in *Cain v. Yukon Public Schools, District I-27*,[35] held that while the school district in question may not have strictly followed the appropriate procedures, the parents had actual knowledge of and were actively involved in the development of the district's educational program for their child. Therefore, the parents could not complain of the failure to strictly follow procedures.

Similarly, in *Scituate School Committee v. Robert B.*,[36] the District Court of Rhode Island held that a student's IEP was not invalidated by the failure of the school district to follow federal and state procedures. The notice to the child's parents about the IEP meeting neglected to state the purpose of the meeting and to identify which individuals would be in attendance. The district court found that in the case before it, the spirit of the regulation which required such information to appear on the notice had been met since the student's mother had attended a previous IEP meeting and was, in fact, aware of the purpose of such meetings. In addition, the participants at the meeting were the same individuals who had attended an earlier meeting with the student's mother. Because the mother brought her lawyer with her, the court found that she must have

---

[34] 593 F Supp. 902 (D. Del. 1984).

[35] Cain v. Yukon Public Schools, ___F.2d, 1985–86 EHLR DEC. 557: 174 (10th Cir. 1985).

[36] 620 F Supp. 1224 (D.R.I. 1985).

known of her right to bring an outsider. Because the mother had not been prejudiced by the technical omissions on the notice form and because the school district had not acted in bad faith or deliberately intended to give an inadequate notice, the court found that the minor procedural errors were not sufficiently important to justify invalidating the IEP.

The parents also contended that the IEP should be invalidated because they were presented with a completed IEP at the IEP meeting and hence, were denied an opportunity to participate meaningfully in the IEP's formulation and development. After reviewing the evidence, the court found that the parents had been given an opportunity to play, and indeed had played, an active role in the development of their son's IEP prior to the actual meeting. Both the mother and her attorney who attended the meeting were aware that they could actively participate in the meeting. Furthermore, three days after the meeting, the parents' attorney sent a letter informing the school district that the parents needed additional time to evaluate the IEP. This letter indicated that the parents were aware that they had a right to provide additional input. Consequently, the court concluded that the IEP presented at the IEP meeting was a professional recommendation offered only to receive input from interested parties and to formulate a final, formal educational program for the child.

In an interesting footnote, the court observed that while a "tremendous importance (had been) accorded procedural safeguards" by the courts, no court, with the exception of an intermediate Massachusetts state court in *Isgur v. School Committee of Newton*,[57] and a federal court applying the law developed in *Isgur*, in *Town of Burlington v. Department of Education for the Commonwealth of Massachusetts*,[58] has addressed the issue of whether an IEP developed in a procedurally flawed manner is automatically invalid. Suggesting the possibility of other approaches, the district court of Rhode Island declined to decide the effect of procedural irregularities to a proposed IEP since it had determined that the IEP in the case before it had been developed in compliance with the mandated procedures.

Impartiality of Hearing Officer

The Southern district court of Ohio held in *Stark v. Walter*,[59] that state procedures for appeal of a due process hearing decision violated 20 U.S.C. § 1415(c) and § 1415(e)(1) requiring an impartial review by allowing the State Board of Education to review the finding of the referee and make a final disposition of the appeal.

In *Aleem v. Keene*, *supra*, the parents challenged the unilateral appointment by the district superintendent of the due process hearing officer and state level review officer as a violation of their right to an impartial administrative hearing and contended that "educators" should not be selected to sit as hearing officers. The district court of Delaware disagreed and held that the appointment of the two hearing officers by the school district complied with applicable state and federal regulations.

In Alabama, officers and employees of local school systems which the child in question does not attend as well as university personnel who have been involved

---

[57] 400 N.E.2d 1292 (Mass. App. 1980).

[58] 736 F.2d 773 (1st Cir. 1984) *aff'd on other grounds*, 105 S.Ct. 1996 (1985).

[59] Stark v. Walter, 1984–85 EHLR DEC. 556: 203 (S.D. Ohio 1984).

in the formulation of state policies on educating handicapped children were enjoined from being appointed to serve as due process hearing officers. In *Mayson v. Teague*,[40] the Eleventh Circuit upheld the finding of the district court that local educational agency personnel, including those employed by school districts not involved with the child were nevertheless "very closely aligned with and "to some extent under the direct or indirect supervision of" the state superintendent and the State Board of Education and hence may not be able to be objective. Likewise, university personnel who have taken part in developing state policies in the area of special education also were found not to meet the impartiality requirements of the federal statute and regulations.

In *Colin K. v. Schmidt*,[41] the public school district contested the impartiality of the state review officer who had ordered a private residential placement for two learning disabled children with associated emotional problems. The school district contended that the review officer was an employee of the state educational agency. The district court of Rhode Island had held that the school district was not within the "protected class" that Congress envisioned when it prohibited review officers from being employees of the state educational agency involved in the care of the handicapped child at issue. Rather, the district court said, the prohibition was intended to insure impartiality exclusively to handicapped children and their parents and guardians. Hence, the district court concluded the school district could not challenge the alleged defect in the state review procedure. On appeal, the First Circuit Court of Appeals found it unnecessary to decide whether a local educational agency may ever challenge the designation of a state agency employee as a review officer since the school district in the case before the First Circuit raised the issue for the first time in briefs to the district court rather than earlier at the administrative hearings.

Presence of Lay Representative

In *Victoria v. District School Board of Lee County, Florida*,[42] the parent protested that the hearing officer denied her the right to have lay representation in the administrative proceedings in violation of state and federal law. The layman had been permitted to sit at the counsel table, to advise the mother on how to proceed and to suggest questions for her to ask the witnesses. The Eleventh Circuit agreed with the Florida Supreme Court that the formal administrative procedure of that state required at least some knowledge of the applicable state procedural law for effective lay representation, and in light of the chosen layman's almost complete ignorance of state administrative procedures, the layman's role was properly limited.

COURT APPEALS

Standards of Review

A number of court cases have addressed the standard of review to be applied by courts reviewing administrative hearing decisions. The *Rowley* decision established that while EAHCA calls for a review *de novo* of the administrative decision, nevertheless, "due weight" is to be given to the administrative proceedings.

[40] Mayson v. Teague, 749 F2d 652, 655 (11th Cir. 1984).

[41] Colin K. v. Schmidt, 715 F2d 1 (1st Cir. 1983).

[42] 741 F2d 369 (11th Cir. 1984).

The First Circuit in *Colin v. Schmidt*, described the judicial review proceedings as "something short of a trial *de novo*."[43] It noted its responsibility to uphold the factual findings of a district court unless they are clearly erroneous.

In *Town of Burlington v. Department of Education for the Commonwealth of Massachusetts*, *supra*, the First Circuit further construed the statutory language of EAHCA which provides that the reviewing court "shall hear additional evidence at the request of a party." The circuit court interpreted "additional" as meaning "supplemental" and held that, accordingly, the clause does not authorize witnesses at trial to repeat or embellish their previous testimony at the administrative hearing. The court declined, however, to adopt a rigid rule prohibiting testimony from all witnesses who did, or could have, testified before the administrative hearing and instead left to the discretion of the trial court the determination of what "additional" evidence is to be considered. As for the deference to be given by reviewing courts to the administrative findings of facts, the First Circuit found that in recognition of the expertise of the administrative agency, the reviewing court "must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole."[44]

The Third Circuit held in *Geis v. Board of Education of Parsippany-Troy Hills*,[45] that in deciding a placement under the Education of the Handicapped Act, a district court must make an independent determination based on a preponderance of the evidence, giving due weight to the state administrative proceedings. The Third Circuit concluded that the district court had done exactly that from its "thorough opinion" which specifically cited the evidence supporting its conclusion and which discussed the conflicting evidence.

In *School Board of Prince William County, Virginia v. Malone*,[46] the issue was raised whether the district court improperly gave deference to the decision of the state hearing officers or whether it should have given deference instead to the decision of the school board. The Fourth Circuit found that the district court correctly gave due weight to the state administrative decision. Had the district court given deference only to the decision of the school board, the Fourth Circuit observed, the entire process of administrative review would have been rendered meaningless. As the Third Circuit did in *Geis*, the Fourth Circuit then reviewed the district court's findings and found no reason to hold that they were clearly erroneous.

The district court's decision was reversed by the Sixth Circuit in *Clevenger v. Oak Ridge School Board*.[47] The federal appellate court held that the district court's decision on whether a specific educational program is appropriate appears to be a mixed question of fact and law. While the Sixth Circuit stated that some mixed questions of fact and law are reviewed under the clearly erroneous standard, it found that the general rule is that they are freely reviewable on appeal. Because the court believed there was a complete lack of evidence that the placement proposed by the school was the appropriate educational place-

---

[43] 715 F2d at 5.

[44] 736 F2d at 792.

[45] 589 F Supp. 269 (D.N.J. 1984), *aff'd*, 774 F2d 575 (3d Cir. 1985).

[46] 762 F2d 1210 (4th Cir. 1985).

[47] 744 F2d 514 (6th Cir. 1984).

ment for the child, under either standard, the district court's decision could not be upheld.

The Eleventh Circuit held in *Victoria L. v. District School Board of Lee County, Florida*,[48] that while "the EAHCA requires a district court to determine whether a handicapped child is receiving an appropriate education 'based upon the preponderance of the evidence,' 20 *U.S.C.* § 1415(e), it is not free to substitute its own notions of sound educational policy for that of the school board." 741 F.2d at 373. In the absence of any evidence that the school board's decision to transfer the learning disabled student from high school to an alternative learning center was in any way erroneous, the hearing officer and the district judge have no power to substitute their judgment for that of the school board.

Although the Circuit Court of the District of Columbia in *McKenzie v. Smith*,[49] recognized that a district court must give "due weight" to the expertise of the school officials responsible for providing the child's education, it also held that the deference granted will be commensurately lower where there is no indication that the school officials' expertise has been brought to bear on the individual needs of the handicapped child. The circuit court's opinion noted that the district court made its determination based upon the preponderance of the evidence and affirmed the district court's factual findings because they were not clearly erroneous even though the circuit court believed that the evidence could also support a contrary conclusion.

The Northern district court of Georgia in *Tracey T. v. McDaniel*,[50] held that, in general, where an IEP has been upheld in the state administrative process, the party challenging the IEP in federal district court bears the burden of persuasion. Such an approach, the court observed, accords the administrative agency's expertise the respect it is owed. Any other allocation of the burden of proof, the court noted, would make the administrative process a meaningless exercise.

In Delaware, the district court held in *Alvin v. Keene*, *supra*, that although reviewing courts must make an independent review of the evidence to determine whether the state has offered an appropriate education, they must give "due weight" to state administrative decisions. The court found that the school district met its burden of proving by a preponderance of the evidence that it had programs to implement the student's IEP.

In *Russell v. Jefferson School District*,[51] the Northern district court of California held that its role in reviewing the handicapped child's educational program is more limited than deciding the best education to be provided for the child. It added that the district court is to give "due weight" to the administrative proceedings and must be careful to avoid imposing their views of preferable education methods. Nevertheless, the court disagreed with the decision of the hearing officer and after considering additional evidence, found by a preponderance of the evidence that the school district's program did not address the child's needs for physical safety and language development and was not reasonably calculated to enable the child to receive educational benefits.

The opinion of the Appellate Court of Illinois in *Community High School District v. Denz*,[52] addressed the standard of review to be taken by a state trial

---

[48] 741 F.2d 369 (11th Cir. 1984).

[49] 771 F.2d 1527 (D.C. Cir. 1985).

[50] Tracey T. v. McDaniel, 610 F. Supp. 947 (N.D. Ga. 1985).

[51] Russell v. Jefferson School District, 609 F. Supp. 605 (N.D. Cal. 1985).

[52] Community High School District v. Denz, 463 N.E.2d 998(Ill. App. 1984).

court and by a state superintendent. Citing the *Rowley* decision, it was held that the trial court should base its decision on the preponderance of the evidence while giving "due weight" to the state administrative proceedings. One of the parties contended that the *Rowley* standard of review should have been followed also by the state superintendent. The court, however, found that argument to be unpersuasive for two reasons. First, the *Rowley* decision did not address the review process of a state administrative hearing officer. Secondly, the justification for a limited judicial review by the courts—a lack of specialized knowledge and experience—did not apply to the state superintendent of education. Thus, the state superintendent was not required to give due deference to the decisions of the local school district.

The Nebraska Supreme Court in *Adams Central School District v. Deist*,[53] looked to the appropriate Nebraska statute to determine the appropriate standard of review. That statute gave the courts only a limited review to determine if the agency's decision was supported by competent evidence or if it was arbitrary or capricious. The state reviewing court in Nebraska is not to make independent findings of its own.

Time to Appeal

No general statute of limitations governs litigation in federal courts and the EAHCA sets forth no time period following the administrative proceedings for filing a civil action in federal court. When a federal statute fails to specify a limitations period for a cause of action, the court applies the most analogous state statute of limitations to determine whether the action has been timely brought. *Monahan v. State of Nebraska*.[54] Consequently, in selecting an appropriate statute of limitations, federal courts have analyzed how closely analogous the federal court review of a state administrative decision regarding a handicapped student is to a review of administrative decisions generally in the state where the federal court is located.

The District Court of Nebraska in *Monahan*, which was decided before *Rowley*, observed that because the filing of a federal cause of action under the EAHCA in a federal district court involves the possibility of hearing new evidence and an obligation to reach an independent decision based upon a preponderance of the evidence, Congress envisioned such an action to be more than the customary appeal from an administrative decision. In contrast, the state review procedure in Nebraska was much more limited. No evidence was allowed to be considered that was not contained in the administrative record and the reviewing court could not make an independent factual determination but instead was restricted to ascertaining whether the agency decision was based upon substantial evidence or was arbitrary and capricious. Furthermore, the Nebraska Court was concerned that thirty days would not be enough time for a parent to assess the commissioner's decision. Consequently, the state statute of limitations of thirty days

[53] Adams Central School District v. Deist, 334 N.W.2d 775 (Neb. 1983).

[54] 491 F Supp. 1074 (D. Neb. 1980), *aff'd in part, vac. in part*, 645 F2d 592 (8th Cir. 1981), *on remand sub nom.*, Rose v. State of Nebraska, 530 F Supp. 295 (D. Neb.), *aff'd in part, vac. in part*, 687 F2d 1164 (8th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983), *on remand*, 575 F Supp. 132 (D. Neb. 1983), *modified*, 748 F2d 1258 (8th Cir. 1984), *cert. denied sub nom.*, Lutjeharms v. Rose, 106 S.Ct. 161. *See also* Tokarcik v. Forest Hills School District, 665 F2d 443 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982).

controlling administrative appeals to state courts was found to be neither analogous to nor appropriate for suits under the EAHCA in federal courts.

The Third Circuit in *Tokarcik*, *supra*, adopted the approach of the *Monahan* court and similarly refused to apply a thirty-day statute of limitations set forth in the state law. Without deciding the question, the Third Circuit suggested that the state's two-year statute of limitations for actions to recover damages for injuries caused by the wrongful act or negligence of another might be appropriate.

The Fifth Circuit has also rejected the thirty-day statute of limitations for general appeals from a state agency to a state court and specifically held in *Scokin v. State of Texas*,[55] that the two-year statute of limitations period generally applicable to tort claims was most appropriate to be applied to actions brought under the EAHCA.

In Illinois as well, the Northern District Court found that the scope of inquiry and review under the EAHCA was much broader than that permitted under the Illinois Administrative Review Act and that the latter only provided for the reviewing court to affirm, reverse or remand an administrative decision. The court concluded, therefore, in *Max M. v. Thompson*,[56] that the state's statute was not sufficiently analogous to justify applying the 35–day limitation period to a federal court action.

On the other hand, the Ninth Circuit in *Department of Education, State of Hawaii v. Carl D.*,[57] found that Hawaii's statute governing review of administrative decisions was sufficiently analogous to the EAHCA for purposes of applying the state thirty-day statute of limitations for a suit filed by the Hawaii Department of Education challenging an adverse hearing officer's decision. Relying on the importance of a prompt resolution of disputes involving education plans for handicapped children and without deciding whether equitable principles would extend or toll the period in cases where parents were not informed of their rights under the statute, the Ninth Circuit affirmed the district court's dismissal of the action for failure to be timely brought. The court distinguished the *Monahan* case on the basis that the Hawaii Administration Procedure Act, in contrast to the Nebraska statute in *Monahan*, permitted the introduction of additional evidence if authorized by another statute and allowed for a broader standard of review than the EAHCA as interpreted in the *Rowley* decision.

The Second Circuit in *Adler v. Education Department of State of New York*,[58] also affirmed the holding of the federal district court that an action brought under the EAHCA was barred because it was not brought within the four-month statute of limitations established by state law for review of commissioner's determinations regarding handicapped children. The parents of a handicapped child had appealed the denial of reimbursement of tuition expenses incurred during the pendency of the administrative proceedings. While the Second Circuit recognized that the standard of review under the state appeal statute differed slightly from that under the EAHCA, the difference did not justify a different statute of limitations and viewing of the fact that four months should provide ample time for preparing additional evidence, the court applied the four-month statute of

---

[55] 723 F.2d 432 (5th Cir. 1984).

[56] 566 F. Supp. 1330 (N.D. Ill. 1983), *reconsideration denied in part, granted in part*, 585 F. Supp. 317 (1984), *amended on other grounds*, 592 F. Supp. 1450.

[57] 695 F.2d 1154 (9th Cir. 1983).

[58] 760 F.2d 454 (2d Cir. 1985).

limitations of the state law to federal causes of action under the EAHCA. The Court also expressed concern that there be uniformity between state and federal actions to avoid forum shopping, and that the alternative three-year statute of limitations proposed by the parents in *Adler* could keep a child incorrectly classified or placed in an inappropriate program for an excessively long period of time before a federal action to review the placement had to be commenced.

MISCELLANEOUS

Infectious Diseases

In a case that may have implications for children afflicted with diseases such as AIDS, *Community High School District 155 v. Denz*,[59] the Appellate Court of Illinois, Second District, affirmed a trial court's finding upholding a determination by the state superintendent that a handicapped student who was a carrier of infectious hepatitis B should be placed in an educational setting less restrictive than a homebound program.

Viewing testimony regarding the student's personal care habits and of the testimony of a representative of the state board of health and of the student's personal physician, the court found that a preponderance of the evidence established that there was a relatively low risk of transmission of the disease to other students in a mainstreamed setting so long as appropriate sanitary procedures were followed. The school district had contended that the appropriate placement was a homebound placement with a one-to-one tutor. The court recognized that a major educational goal is the socialization process that occurs in the classroom and that in this case, the risk of transmission of the disease did not outweigh the injury to the student if she remained isolated from her peers.

[59] 463 N.E.2d 998 (Ill. App. Ct. 1984).

Supreme Court Update

by: Gwendolyn H. Gregory

Public school attorneys must continue to give their attention to the activity of the U.S. Supreme Court since the number of its decisions involving or affecting public education shows no indication of declining. The October 1985 Term demonstrated the range of issues being decided by the Court which impact upon public schools.[1]

FIRST AMENDMENT

A major focus of the Supreme Court's constitutional analysis last term, the First Amendment reappeared this term in a number of cases involving schools.

Political Association/Free Speech

Chicago Teachers Union v. Hudson,[2] raised issues regarding the constitutionality of the attempt by the American Federation of Teachers' (AFT) affiliate representing the Chicago public school teachers to charge non-union teachers a portion of the agency shop fee attributable to collective bargaining expenditures and to provide a complaint procedure for dissenting employees.

The union charged non-members 95% of the fee it charged members. The union based the charge upon a calculation of the union's expenses, unattributable to collective bargaining and contract administration, divided by the union's income for the year.

Under the complaint procedure adopted by the union and approved by the school board, employees could not object in advance of collection of the fee, nor could they receive an itemization of union expenditures in advance in order to determine whether they wanted to complain. Under a three-step process, after the filing of a complaint, the union's executive committee considers the objection and notifies the complainant of its decision. The complainant may then appeal the decision, thereby forcing the executive committee to reconsider its decision. Finally, if the complainant continues to object, the union president selects an arbitrator from a list maintained by the Illinois Board of Education.

Although in the district court the plaintiffs complained that certain expenditures charged back to non-union members were for ideological purposes, they did not raise that objection in the court of appeals. The union also modified its position, placing 100% of the agency fees of the objecting employees in an escrow account.

---

[1] **Editor's Note: This article contains many of the 1985 Term Supreme Court opinions affecting public schools. Additional Supreme Court cases which may interest school attorneys are covered in *Inquiry and Analysis*, July 1986.**

[2] **106 S.Ct. 1066 (1986).**

The Seventh Circuit Court of Appeals held the A.F.T. affiliate's procedure to be constitutionally infirm. The U.S. Supreme Court, in a rare unanimous decision, agreed. First, the High Court held that a mere rebate process, under which funds are not remitted until *after* the filing of a complaint and the completion of due process proceedings, is inadequate because the union may temporarily use the funds for improper purposes.

Second, the Court faulted the union for failing to advise the employees of the method used to determine the "fair share" unless the employees filed a complaint. The Court also directed the union to explain to the non-members how it reached the 95% figure assertedly covering expenses *related* to collective bargaining. Under the disputed procedure the union merely explained how it arrived at the 5% for costs *unrelated* to bargaining.

Thirdly, the Court held the due process procedure to be defective because it failed to provide for a "reasonably prompt decision by an impartial decision-maker."[3] In its *amicus* brief, the National Education Association (N.E.A.) argued that it selected wellknown arbitrators with a professional interest in maintaining their reputation for impartiality. The Court rejected this argument, stating that arbitrators may not be chosen at the sole discretion of the union; furthermore, the Court also rebuffed the union's argument that the existence of a judicial remedy adequately corrected any deficiencies in the arbitration process.

Although the Court does not require a union to escrow 100% of the shop fee, the union must justify the limited escrow "on the basis of an independent audit and the escrow figure [must] be independently verified."[4] The fact that the union had chosen on appeal to escrow 100% of the fee did not remedy all the defects in the complaint procedure. The Court found that although the 100% escrow may have eliminated the risk that the union would misspend any of the fee, such an escrow procedure "does not provide an adequate explanation for the advance reduction of dues, and it does not provide a reasonably prompt decision by an impartial decisionmaker."[5]

This case may not appear, at first blush, to be of real importance to school boards. Although it does involve internal union problems, school boards cannot assume the stance of disinterested bystanders on this issue. If the board enters into an agreement with the union which results in a constitutional infringement of rights of any of the school district's employees, the school board is responsible. Therefore, in the event the board does decide to include an agency shop fee provision in the contract, the board must assure that the Supreme Court standards are met:

- The union must provide the non-members an accounting of the "fair share" determination, including an itemization of all expenses which are *related* to collective bargaining and contract administration. This includes amounts paid to an affiliate's state and national labor organizations. The amount may be calculated on the basis of the actual expenditures from the previous year.

- If a complaint is filed, the union must set up an escrow in the name of the complaining employee "for the amounts reasonably in dispute." If the original disclosure by the union "had included a certified public accountant's verified break-

---

[3] *Id.* at 1076.

[4] *Id.* at 1078, n. 23.

[5] *Id.* at 1077.

down of expenditures," the escrow need not include the portion of the fees represented by those categories which no dissenter could reasonably challenge. A "100% cushion" is not required.[6]

- Finally, the dissenting employee must be provided a reasonably prompt opportunity to challenge the fee before an impartial decisionmaker. Under the Supreme Court decision in *Abood v. Detroit Board of Education*,[7] the employee bears the burden of proving that the charges are not warranted.

Of course, the school board always has the option to refuse to collect "fair share" fees from non-union employees.

Student Free Speech

Another First Amendment case involving student free speech and religion issues, unfortunately, was not decided by the Court on its merits. *Bender v. Williamsport Area School District*[8] raised the question of whether the First Amendment requires, under the Free Speech Clause, or prohibits, under the Establishment of Religion Clause, school districts from allowing student religious clubs to meet during the school's activities period.

Students at Williamsport High School are allowed to form clubs and meet twice a week during the "activities period," which is held after the roll is taken and before classes begin. No club had ever been refused recognition until a religious group called Petros asked to meet. The school principal first allowed the club to meet but later, on advice of counsel, prohibited the group from meeting.

In a suit filed by Petros members, the district court found in favor of the group. The court held that since the district "is not constitutionally required to deny the plaintiffs the opportunity to meet, by doing so solely on constitutional grounds it has impermissibly burdened their free speech rights."[9] Although the school district voted not to appeal, John Youngman, Jr., a dissenting member of the board, appealed the decision on his own. The court of appeals reversed, agreeing that free speech rights were implicated, but holding that the Establishment Clause stands on a higher plane and, therefore, the school district's decision not to allow Petros to meet was correct. Petros then filed a petition for *certiorari* with the U.S. Supreme Court, which was granted.

On March 25, 1986 the Court ruled in a 5–4 opinion, that Mr. Youngman did not have standing to appeal the case to the court of appeals. The Court vacated the court of appeals decision and remanded the case with instructions to dismiss the appeal for want of jurisdiction. Thus, the district court decision allowing Petros to meet, stands.

The majority opinion by Justice Stevens quoted from both the district court and court of appeals opinions, citing the importance of the unique facts in this case. The majority's opinion emphasized that it is imperative that opposing parties all of whom have standing to sue argue these cases.

At oral argument, the parties and the U.S. Government as *amicus* raised three rationales for standing: official capacity as a member of the Board, individual

[6] *Id.* at 1078.

[7] 431 U.S. 209 (1977).

[8] 106 S.Ct. 1326 (1986).

[9] 563 FSupp. 697, 699–700 (M.D. Pa. 1983).

capacity and capacity as a parent. The Court held that a dissenting member of a school board does not have the right to "'step into the shoes of the Board' and invoke its right to appeal,"[10] therefore giving him no *official* right to appeal. Although an award of attorneys' fees was outstanding against Mr. Youngman in his "official" capacity, the Court opined that that fact did not give him a personal stake in the outcome of the controversy and, therefore, did not give him standing to appeal in his *individual* capacity.

Regarding Mr. Youngman's standing as a parent, the Court found that the record indicated nothing about his status. "For all that appears in the record, Mr. Youngman and his children might even be active supporters of Petros."[11] The Court also noted that Mr. Youngman did not make "timely application," under Fed. R. Civ. P. 24 to intervene in the action as an interested parent.[12] Justice Marshall, in a concurring opinion, pointed out that he would have agreed that Mr. Youngman had standing, had he intervened in the action in his capacity as parent. However, Justice Marshall noted that briefs in the case indicated that Mr. Youngman's child was not a student in the school at the time of appeal.

In a dissenting opinion, in which Justices White and Rehnquist joined, Chief Justice Burger disagreed with the majority on the standing issue, stating that Youngman had standing as a parent. The dissent also asserted that the Court's decision in *Widmar v. Vincent*[13] "clearly controls the resolution of this case."[14] That case held that a college abridges First Amendment rights of students in a religious club when the college precludes them from meeting on school grounds while allowing all other types of clubs to meet.

Justice Powell, a former member of the Richmond, Virginia School Board, in a separate dissent stated his belief: "I do not believe—particularly in this age of massive media information—that the few years difference between high school and college students justifies departing from *Widmar*."[15]

Should this case affect the advice given by school board attorneys to their clients? After the passage of the Equal Access Act, which in essence requires federally funded public schools to follow *Widmar v. Vincent*, school districts face a difficult dilemma in deciding whether to follow the statute or the case law conflicting with the statute.

Prior to the Third Circuit decision in *Bender*, every court of appeals decision involved school districts which historically had attempted to bring prayer or religion to the public schools. No such history was evident in *Bender*. Now that the Third Circuit has been reversed, (even though on procedural grounds), it might be easier to advise school boards, which have no history of attempting to establish religion, to follow the lead of the district court in *Bender* and allow religious groups to meet. That course gains support from the strong dissents in *Bender*, and the importance which the majority places on the facts in this type of case. On the other hand, in districts where prior acts of the board might increase the likelihood of a perception in the students' minds of official endorse-

---

[10] 106 S.Ct. at 1333.

[11] *Id.* at 1334.

[12] *Id.* at 1335, n. 9.

[13] 454 U.S. 263 (1981).

[14] 106 S.Ct. 1337.

[15] *Id.* at 1339.

ment of religious clubs, the school district would be well advised to preclude such groups from meeting during the school day.

Bethel School District No. 403 v. Fraser,[16] an opinion issued on the final day of the Court's term, received wide publicity prior to the Court's decision because of the interesting fact situation. The action was filed by Matthew Fraser, a student in the Bethel School District No. 403 located just outside Tacoma, Washington. An honors student and debator, Fraser made a nomination speech for a fellow student at a student assembly called for that purpose. The speech contained sexual innuendo and after the speech, the Assistant Principal of the high school called him into the office where the student produced a copy of the speech and told the assistant principal that he delivered it in order to get the attention of the students.

Fraser delivered a speech as follows:

> "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most of all, his belief in you, the students of Bethel is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> So vote for Jeff for ASB vice-president—he'll never come between you and the best our high school can be."[17]

The school suspended Fraser for three days and removed his name from the list of nominees for speaker at the upcoming graduation. Not surprisingly, the students later selected him by write-in ballot to be the graduation speaker.

The district court enjoined the board to allow Fraser to speak at the graduation. The U.S. Court of Appeals for the Ninth Circuit upheld the lower court's judgment award of $278 in damages and $12,750 in attorney's fees against the school board. It held that although the speech caused a "boisterous" reaction by some students in the audience, the administration had no difficulty in maintaining order and did not meet its burden of showing that the remarks "materially disrupted" the educational process.[18]

The court of appeals also refused to accept the contention that a school district has a right to discipline a student for "indecent" remarks, stating: "We fear that if school officials had the unbridled discretion to apply a standard as subjective and elusive as 'indecency' in controlling the speech of high school students, it would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools."[19]

The court also drew a distinction between a classroom activity and an assembly, which the court considered to be an extra-curricular activity because students had their choice between attending the assembly or a study hall.

In a 7–2 decision the Supreme Court reversed the lower court decisions. While the Court acknowledged that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v.*

---

[16] 54 L.W. 5054 (U.S. July 7, 1986).

[17] As quoted at, 54, L.W. 5057 (Brennan, J., concurring).

[18] 755 F2d at 1356, 1360–1361 (9th Cir. 1985).

[19] 755 F2d at 1363.

Des Moines Independent Community School District,[20] the Court also reiterated that "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."[21] The Court, in an opinion by Chief Justice Burger, stated that "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behaviour."[22] In Burger's view, a school may appropriately prohibit the use of vulgar and offensive terms in public discourse. Burger stated: "The schools, as instruments of the state, may determine that the essential lesson of civil mature conduct cannot be conveyed in a school that tolerates lewd, indecent or offensive speech and conduct. . ."[23]

The Court also pointed out that prior decisions have recognized limits on First Amendment expression when the speech is "sexually explicit" and the audience may include children.[24] The Court also cited *Board of Education v. Pico*,[25] to the effect that a school board has authority to remove books that are vulgar. This protection of minors from exposure to sexually explicit, indecent or lewd speech has also been extended to the spoken word.[26]

In concluding its First Amendment analysis, the Court ruled that the school acted within its authority in disciplining Fraser, since it did not impose penalties based on any political viewpoint. The Court stated: "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."[27]

In response to Fraser's due process claim that he had received no prior notice that his speech would subject him to punishment, the Court reaffirmed that schools need a certain degree of flexibility in their disciplinary procedures. Nor must school disciplinary rules be as detailed as a criminal code. The Court found the school's disciplinary rule against "obscene" language and the pre-speech warnings to Fraser by several teachers to be adequate notice of the possibility of sanctions.

State Aid to Private Schools

In a unanimous decision, the Supreme Court upheld the extension of state aid for vocational rehabilitation of students attending private, sectarian schools. In *Witters v. Washington Department of Services for the Blind*[28] the Court overturned a Washington State Supreme Court ruling. The lower court had ruled that the primary effect of financially assisting a blind student in the studies necessary for a career within a church was to advance religion and, thus, contravened the Establishment Clause of the First Amendment.

---

[20] 393 U.S. 503 (1969).

[21] 54 L.W. at 5056.

[22] *Id.* at 5055.

[23] *Id.* at 5056.

[24] Ginsburg v. New York, 390 U.S. 629 (1968).

[25] 457 U.S. 853 (1982).

[26] F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978).

[27] 54 L.W. at 5056.

[28] 106 S.Ct. 748 (1986).

In its analysis, the Court used the three-prong test it set out in *Lemon v. Kurtzman*.[29] As all parties conceded the secular purpose of the statute and the courts declined to address the issue of "entanglement" based upon the inadequacies of the record, the key issue was the "principal or primary effect" of the aid. In relying upon the record, the Court found direct payment of aid to the student, who then chose a religious education, is support of religious institutions only as a result of the "genuinely independent and private choice" "by the individual, not the State." The Court also found persuasive the fact that the record did not indicate that "any significant portion" of the aid program would end up supporting religious education. The Court likened the aid to a permissible transfer as opposed to an "impermissible direct subsidy"[30] and, therefore, found no state subsidization or endorsement of religion as prohibited by the Establishment Clause present in the Washington statute.

The U.S. Department of Education is citing this case in support of its push for the adoption of a voucher program in lieu of funding under Chapter I of the Education Consolidation and Improvement Act. The *Witters* decision, however, does not provide as much support for a voucher program as the Administration asserts. First, *Witters* involved an aid to religion dispute in the context of higher education. The Court has always distinguished its First Amendment holdings at the university level from those applicable to elementary and secondary education. Second, the *Witters* case is very fact specific, the Court noting that there was no evidence indicating that anyone besides the petitioner had ever used the funds in question to finance a religious education. This fact gained added significance from the Court's omission of any substantive mention of *Mueller v. Allen*.[31]

Damages

A case in which a teacher filed an action asserting First Amendment and Due Process claims against the superintendent, the school board and the school board members individually of the Memphis, Michigan schools further clarified the limits of a school board's § 1983 liability for constitutional violations.

The case, *Memphis Community Schools v. Stachura*,[32] arose out of complaints by parents about the teaching methods and materials used by a teacher in the sex education portion of a seventh grade life-science class. After an uproarious, open school board meeting in which the teacher was not present, the board suspended the teacher with pay without any type of administrative hearing. As a result of the statements made by the parents, several local news stories contained allegations that the teacher had been labeled a "sex maniac" and news accounts also appeared in national publications. It was later shown that the teacher's textbooks, films and lesson plans had been used for several years and had been approved by parents, the school board and the principal in advance of their use.

Before being reinstated the next fall, the teacher brought suit seeking compensatory and punitive damages under 42 U.S.C. § 1983 for constitutional deprivation of First and Fourteenth Amendment rights. After the trial, the district court's instructions authorized two distinct types of compensatory damages: one for

---

[29] 403 U.S. 602, 612–613 (1971).

[30] 106 S.Ct. 748, 752.

[31] 463 U.S. 388 (1983).

[32] 54 L.W. 4771 (U.S. June 24, 1986).

actual harm to the teacher, and another based on the "value" of "any Constitutional right" and "the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right."[33]

The jury returned a verdict against the school board in the amount of $233,750 for total compensatory damages; against both the board president and the superintendent in the amount of $8,250 compensatory and $15,000 in punitive damages; and against each of the other board members in the amount of $2,750 compensatory and $1,000 punitive. The court of appeals affirmed the district court's damage award and upheld the instruction authorizing damages for the deprivation of "any Constitutional right" because "there was ample proof of actual injury to plaintiff Stachura."[34]

The Supreme Court, in reviewing the compensatory damage instruction issue, agreed with the school board's characterization of the jury instructions as permitting "the jury to award damages based on its own unguided estimation of the value of such rights."[35] Justice Powell, with frequent references to *Carey v. Piphus*,[36] restated the basic purpose of § 1983 damages as governed by common law tort principles: "*to compensate persons for injuries* that are caused by the deprivation of constitutional rights."[37]

The Court repeatedly asserted that "the abstract value of a constitutional right may not form the basis for § 1983 damages."[38] In striking down the instruction, therefore, the Court found an improper focus upon "the jury's subjective perception of the importance of constitutional rights as an abstract matter."[39] The Court made clear that the challenged instructions "do not authorize compensation for injury" and "only that damages based on the 'value' or 'importance' of constitutional rights are not authorized by § 1983, because they are not truly compensatory."[40]

In concurring, Justices Marshall, Brennan, Blackmun and Stevens stressed this narrow holding and emphasized the Court's previous holdings that the deprivation of a constitutional right "may itself constitute a compensable injury."[41] In *Carey v. Piphus*, the Court referred to cases that upheld substantial compensatory damages awards for implicit personal injury that occurs upon the deprivation of the right to vote.

In reflecting upon this case, the importance of school boards following a fair and reasonable process in deliberating matters involving moral turpitude cannot be overemphasized. Juries and lower courts are particularly vulnerable to a common sense doctrine of "fairness" and, if it appears that the school board is acting oppressively toward a student or employee, often the school board will

---

[33] *Id.* at 4772.

[34] Stachura v. Truszkowski, 763 F.2d 211, 214 (6th Cir. 1985).

[35] 54 L.W. at 4772.

[36] 435 U.S. 247 (1978).

[37] *Id.* at 254.

[38] 54 L.W. at 4773.

[39] *Id.*

[40] *Id.* at 4774, n. 13.

[41] *Id.* at 4775 (Marshall, J., concurring).

lose even if there is no technical constitutional wrong. As Justice Blackmun pointed out during oral argument, juries are likely to consider the "intrinsic worth" of constitutional rights even in absence of an instruction.

Certainly one has to sympathize with boards who, on the one hand, must deal with this type of hysterical behavior by parents, but, on the other, must assure that the students are protected in the event that the allegations are correct. In this case, however, the damage suffered by the teacher was a result of the *publicity* subsequent to his suspension. While the board had the power to assist the teacher, he was left "swinging in the wind" until they ultimately decided the allegations were unfounded. This case presents a good example of the effects of allowing an issue to fester before taking concrete action to remediate. Fortunately, the Supreme Court was not swayed by these unfortunate facts and decided the case on the legal merits of actual injury as the basis for awarding § 1983 compensatory damages.

SECTION 1983

The Court has decided a § 1983 case defining when a single incident can be characterized as official governmental policy. In this case, *Pembaur v. Cincinnati*,[42] police officers were attempting to serve citations on several witnesses who had refused to obey subpoenas in a criminal proceeding. The police went to their place of employment, where they were refused entry. In fact, the doors were barricaded. They went back to their supervisor who told them to call the Deputy County Attorney. The Deputy consulted with the County Attorney, who told them to "go in and get" the witnesses. The police officers broke down the doors and did not find the witnesses.

A § 1983 action was brought against the police officers, the Deputy County Attorney and the city. It was admitted that at the time that the County Attorney advised the officers to "go in and get" the witnesses, a Sixth Circuit case was in force which upheld, under the Fourth Amendment, break-ins to serve this type of citation. Later, however, that case was overturned by the Supreme Court.

The issue raised, therefore, is whether there was a policy or practice in effect which would make the city liable under *Monell v. New York City Dept. of Social Services*,[43] which limits § 1983 actions to "deprivations of federally protected rights caused by action taken pursuant to official municipal policy of some nature." In a 6–3 decision, the Court held against the city.

All members of the majority agreed that, since the lower court had found it clear that the sheriff and prosecutor were both county officials authorized to establish the official policy of Hamilton County with respect to matters of law enforcement, the lower court erred in failing to find against the city merely because the action taken was a single instance which did not constitute a city policy.

Justice White, in a separate concurrence, stated his belief that not *every* act of municipal officers with final authority to effect or authorize arrests and searches represents the policy of the municipality. Justice O'Connor agreed and, for that reason refused to concur in part of the majority opinion. On the disputed issue, the majority held that "municipal liability attached where a deliberate choice to follow a course of action is made from among various alternatives by the official

---

[42] 106 S.Ct. 1292 (1986).

[43] 436 U.S. 658, 691 (1978).

or officials responsible for establishing final policy with respect to the subject matter in question."[44] The Court's language was drawn from *Oklahoma City v Tuttle*.[45] The plurality further stated that their decision might have been different had the prosecutor only rendered "legal advice," but under state law the prosecutor could establish county policy and that is what he did here.

Justice Rehnquist, in dissent, noted his belief that the Court has now adopted what it rejected last term in *Tuttle*, and now hold that cities are subject to the doctrine of *respondeat superior*.

It is always difficult to deduce what effect these cases will have on school districts. In many cases, it may be a distinction without a difference because often school district employees are covered by the same insurance policies which cover the district itself. Nevertheless, some principles may be deduced; where possible it is wise to make clear that the school board attorney is the district's legal adviser, and is not authorized to make policy for the district. As to administrators, that may be more difficult and cause more problems than it solves.

Given the level at which the decision in this case was made, it does not seem that surprising that the city lost the case. Taking into account the cautionary language in the concurrences of Justices White and O'Connor, the bottom line of this case may not turn out to be too difficult to live with.

In an opinion which will help to limit the § 1983 liability of government officials, the Court unanimously held that the "Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property." *Daniels v. Williams*.[46] This case arose when a prisoner brought a § 1983 claim against a prison guard for the bodily injury he suffered when he slipped on a pillow negligently left on the stairs by a correctional deputy at the jail. The lower courts had ruled in favor of the prison employee.

In order to clarify when tortius conduct by a state official rises to the level of a constitutional tort, the Court agreed to review the case. In retreating from its statement in *Parratt v. Taylor*,[47] that the loss of a prisoner's hobby kit caused by the negligence of prison employees amounted to a deprivation under the Due Process Clause, the Court stated that the historical guarantee of Due Process applied to "*deliberate* decisions of government officials to deprive a person of life, liberty or property"[48] and that the purpose of the clause was to protect individuals from the arbitrary exercise of governmental power.

The Court characterized the conduct at issue in this case as "a failure to measure up to the conduct of a reasonable person" and not an "abuse of power." Rehnquist, writing for the Court, said that to hold that the injury caused by the mislaid pillow is a deprivation under the Fourteenth Amendment would "trivialize the centuries-old principle of due process of law."[49]

Rehnquist declared that the Constitution does not "supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."[50] In Rehnquist's view the only thing governmental in

[44] 106 S.Ct. at 1300.

[45] 105 S.Ct. 2427 (1985).

[46] 106 S.Ct. 662 (1986).

[47] 451 U.S. 527 (1981).

[48] 106 S.Ct. at 665.

[49] *Id.*

[50] *Id.* at 666.

nature in this case is the fact that the person who allegedly acted negligently is a city employee. Such a fact did not suffice to trigger Due Process protections.

Rehnquist pointed out that because the Constitution does not address the injuries inflicted by governmental negligence does not mean that the injured parties do not have protectible legal interests that may be redressed through other means such as state tort claim statutes.

In response to petitioner's argument that some negligence claims most certainly fall under § 1983, the Court stated that it could hold that mere lack of care does not implicate the Due Process Clause and still leave open the possibility that other constitutional provisions might be violated by certain negligent acts. The Court also rejected the notion that prisons owe any special duty of care to inmates sufficient to invoke Due Process protections.

This case is particularly important to states, such as Texas and Virginia, where school boards still retain sovereign immunity. Plaintiffs often resort to suing under § 1983 because they are foreclosed from suit under state law.

SECTION 1988 ATTORNEYS FEES

In City of *Riverside v. Rivera*,[51] the Supreme Court affirmed an appeals court ruling that respondents should receive reasonable attorney's fees for their civil rights case under 42 U.S.C. § 1988. The court allowed the fees even though they exceeded the amount of damages awarded.

A number of police officers from Riverside's police force broke up a party, given by two respondents and attended by eight others, with tear gas and physical force. The officers acted without probable cause, without a warrant and proceeded to arrest four of the respondents together with other guests. The district court later ordered that the charges be dropped.

Respondents brought suit against the city of Riverside and others under 42 U.S.C. §§ 1981, 1983, 1985(3) and 1986 for violations of their First, Fourth and Fourteenth Amendment rights. The jury returned 37 individual verdicts for the respondents and awarded them $33,350 in damages. The respondents requested attorney's fees under 42 U.S.C. § 1988. The district court found that the hours and rates sought were reasonable and awarded the respondents $245,456.25 in attorney's fees. The Ninth Circuit affirmed on appeal of petitioners. Petitioners then sought and were granted *certiorari* to the Supreme Court. The Court vacated the court of appeals judgment and remanded the case for reconsideration in light of *Hensley v. Eckerhart*.[52] The district court reconsidered the case and again concluded that respondents were entitled to the $245,456.25 in attorney's fees. Again, the circuit court affirmed the district court's findings. Petitioners, once again, sought a writ of *certiorari* to the Supreme Court, and it was granted. The Court, after extensive analysis, again affirmed the court of appeals.

In affirming the court of appeals decision, the Supreme Court analyzed the rationale behind 42 U.S.C. § 1988. This act authorizes the district courts to award reasonable attorney's fees to parties prevailing in certain civil rights litigation. The Court reasoned that Congress' intent in passing the law was to create an exception to the *Alyeska* "American Rule" for civil rights cases in which some plaintiffs may not be able to afford competent counsel to preserve their civil

---

[51] 54 L.W. 4845 (U.S. June 27, 1986).

[52] 461 U.S. 424 (1983).

rights.[53] The Court quoted *Newman v. Piggie Park Enterprises, Inc.*[54] by saying that a plaintiff who seeks relief in a civil rights case is doing so for himself as well as others in his position. Hence, such a plaintiff should not be denied his day in court for lack of funds.

The Court relied on its earlier decision in *Hensley v. Eckerhart* where guidelines were set for calculating reasonable attorney's fees under § 1988. The Court rejected petitioners' contention that respondent's attorney should not receive compensation for hours expended on related litigation. In reaching this conclusion, the Court quoted *Hensley* by saying that the lawsuit could not be "viewed as a series of discrete claims," rather "as a common core of facts" or "legal theories."[55]

The Court also rejected petitioners' contention that fees should not be awarded in excess of the damages award. The Court reasoned that such a rule would undermine Congress' intent in enacting § 1988. This would happen because competent lawyers would not be attracted to low paying civil rights cases. If plaintiffs cannot obtain competent counsel, then they will not be able to enforce the civil rights policies which Congress wants enforced.

The Court, after analyzing the results of counsel's work, found that if a private sector contingency fee system were used, or if attorney's fees were limited to an amount proportionate to damages awarded, then counsel could not have devoted the time which the case required. Hence, the respondents may not have won their case. These policies would severely hamper prospective plaintiffs from bringing their legitimate civil rights grievances into court and would thwart Congress' purposes when it enacted § 1988.

In another §1988 case, *Evans v. Jeff D.*,[56] the Supreme Court ruled that a district court is not prohibited by 42 U.S.C. § 1988 from approving a proposed settlement in a civil rights class action case which offers relief that is conditioned upon the waiver of attorney's fees.

Respondents brought a class action against petitioners in federal district court on behalf of children who have been or will be placed in petitioners' care. They alleged that deficiencies in educational and health care services violated the federal and state constitution and various federal and state statutes. Injunctive relief, costs and attorney's fees were sought. The district court approved a settlement granting the injunctive relief but conditioned upon respondents' waiver of any claim of attorney's fees. The court of appeals invalidated the fee waiver, left the rest of the agreement intact, and remanded to the district court for a determination of a reasonable fee. Because of the conflicts among the various courts of appeal on this issue, the Supreme Court granted *certiorari*.

In reversing the court of appeals, the Supreme Court found the issue to be whether the district court had a duty to reject the settlement because of its waiver clause even when the settlement offered is equal to or greater than that which plaintiffs could reasonably expect to achieve at trial. The Court interpreted the language of § 1988 as creating an eligibility for attorney's fees for the plaintiff and did not find that the Act prevents waiver of this eligibility or assignment of this right to an attorney. Hence, the Court concluded that it is not necessary to

---

[53] Aleyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

[54] 390 U.S. 400, 402 (1968).

[55] 461 U.S. at 435.

[56] 106 S.Ct. 1531 (1986).

interpret § 1988 as a rule prohibiting settlements with fee waiver conditions in order to be faithful to the intentions of the Act.

A second question analyzed by the Supreme Court was whether the district court abused its discretion by approving a settlement which included a fee waiver. In noting that Fed. R. Civ. P. 23(e) requires that a court approve the terms of any settlement of a class action before it can become effective, the Court rejected the contention §1988 would disallow approval of an attorney fee waiver. The reason is that it is difficult to interpret any language in the Act which stipulates the award of attorney's fees as a ***requirement***, especially when the respondents are not directly challenging the waiver. Thus, the Act is simply another remedy available to the respondents. The Court concluded that the district court did not abuse its discretion and also found that the district court was correct in finding that the acceptance of the settlement did not breach any ethical duty on the part of respondent's counsel.

TITLE VII

Sexual Harrassment

Meritor Savings Bank v. Vinson[77] presented to the Court for the first time the question of employer liability for "sexual harrassment" of an employee by another employee.

The complainant, Mechelle Vinson, began work for the defendant bank as a teller-trainee. She was hired and supervised during the time in question by a vice president of the bank, and the manager of the branch. Vinson worked at the branch for four years, finally being promoted to the position of assistant branch manager. Apparently there was no dispute that her advancement was achieved on merit alone. At the end of the four years, and after filing the sex discrimination complaint, Vinson took indefinite sick leave, and was discharged two months later for excessive use of that leave.

She brought this action charging her supervisor with sexually harrassing her over a 2–1/2 year period, even to the extent of assaulting and raping her. She attempted to bring in evidence of unwanted touching of other female employees by the supervisor, but the district court refused to allow that evidence, although apparently the trial court did hear some of the evidence.

The district court ruled in favor of the employer and the supervisor on several grounds.

First, the district court held that because Vinson was not required by her employer to grant sexual favors to her supervisor, the employer was not liable for the supervisor's actions. The actions of the employee were, in effect, voluntary. The D.C. Circuit disagreed, stating that an employer can be held liable for pervasive on-the-job sexual harassment by a superior, without evidence of adverse action or threatened adverse action against the female employee. Under the D.C. Circuit opinion, the employee need not prove resistance to the sexual overtures.

Second, the circuit overturned the lower court's ruling as to testimony of other employees. The court held that even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive.

Finally, as to the question of whether Title VII requires that the employer have notice of the conduct of its supervisors before liability for sexual harrassment

[77] 54 L.W. 4703 (U.S. June 19, 1986).

can be imposed, the court answered no. While agreeing that the doctrine of *respondeat superior* does not apply in Title VII cases, the court held, nevertheless, that Title VII imposes an affirmative duty on employers to "take a more active role in warranting to each employee that he or she will enjoy a working environment free from illegal sex discrimination."

The Supreme Court, agreeing with the court of appeals that the plaintiff need not allege economic loss in order to sustain a Title VII action, ruled that Title VII also bars sexual harassment that creates a hostile working environment regardless of any economic loss. The Court said that in order to be actionable the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " In the Court's view, Vinson's allegations including pervasive harassment and charges of rape are "plainly sufficient to state a claim for 'hostile environment' sexual harassment."[58]

The Court also agreed that an employee's voluntary submission to a supervisor's sexual demands is not a defense to a Title VII sexual harassment suit. The Court said "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[59] In this regard the Court said that evidence about the complainant's sexually provocative speech and dress would be relevant to determining whether or not the employee welcomed the sexual advances of a supervisor.

On the issue of employer liability, the High Court ruled that the court of appeals erred in holding that employers are always automatically liable for sexual harassment by their supervisory employees. The Court similarly rejected the employer's view that the availability of a grievance procedure which the employee failed to use and the existence of a policy against such discrimination necessarily insulated the employer from liability. While declining to set out a definitive rule, the Court advised courts to look to agency principles for guidance on this issue. Four dissenters departed from the Court's opinion on this issue in favor of a rule that holds that "sexual harassment by a supervisor of an employee under his supervision leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave 'notice' of the offense."[60]

Pre-Title VII Race Discrimination

In another Title VII case, involving racial discrimination in the form of disparate salaries paid to black and white employees, the Supreme Court held that the offending state agency must eliminate the salary disparities that originated prior to the date that Title VII became applicable to public employers. *Bazemore v. Friday*.[61] In a unanimous concurrence to the per curiam opinion, the Court expressly held that "[a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, he is liable under that statute."[62]

---

[58] *Id.* at 4706.

[59] *Id.*

[60] *Id.* at 4709 (Marshall, J., dissenting).

[61] 54 L.W. 4972 (U.S. July 1, 1986).

[62] *Id.* at 4974.

Having reversed the court of appeals on this issue, the Supreme Court also held that the Fourth Circuit should not have approved the trial court's refusal to admit certain statistical evidence as proof of the salary disparities. The Court stated that a regression analysis for this purpose need not include *all* measurable variables with an effect on salary levels. Omission of certain variables might affect the probative value of the analysis but not its admissibility. The Court also chastized the Fourth Circuit for failing to examine the regression analysis in light of all the evidence in the record.

On a separate issue, the Court split 5–4 as to whether the state agency violated the Constitution by continuing to allow the operation of segregated 4–H and Homemaker Clubs. Five Justices found no violation because the one race clubs occurred by the voluntary choice of the members. Distinguishing this situation from *Green v. School Board of New Kent County*,[55] where voluntary choice programs in public schools were held constitutionally inadequate to satisfy integration mandates, the Court pointed out that while school attendance is compelled and controlled by state created enrollment areas, there is no state compulsion to join 4–H or Homemaker Clubs, nor state authority to deny a person the right to join any club of his or her choosing. The four dissenters disagreed, citing the state agency's history of administering a segregated system of clubs as *de jure* segregation requiring affirmative action to desegregate. The dissenters labelled the Court's distinctions of this case from *Green* "irrelevant," stating that nothing in the Court's previous opinions suggested that the "state's obligation to desegregate is confined only to those activities in which members of the public are compelled to participate."

AFFIRMATIVE ACTION

The Supreme Court issued this term three decisions regarding affirmative action in employment, two decided under Title VII and one under the Equal Protection Clause.

One of these cases, *Wygant v. Jackson Board of Education*,[56] directly involved a school board that entered into a collective bargaining agreement with a teachers union, one of the provisions of which stated that in the event of a layoff, the board would retain those teachers with the most seniority except that the percentage of minority personnel discharged could not exceed the percentage of minorities employed at the time of the layoff. In 1974 when the board failed to comply with the provision, the union along with two minority employees who had been laid off brought suit charging the board with violations of Title VII and the Equal Protection Clause of the Fourteenth Amendment. When the federal district court concluded that it lacked jurisdiction to decide the claims, the plaintiffs brought essentially the same claims in state court. The state court approved the provision despite its adverse effect on white teachers and rejected the board's argument that the provision itself violated the Civil Rights Act of 1964.

After the state court ruling, the school board followed the collective bargaining layoff scheme in future years. This caused the layoff of some nonminority teachers who had more seniority than some of the minority teachers retained by the board. The affected nonminority teachers, charging violations of the Equal Protection Clause, Title VII, 42 U.S.C. § 1983 and other federal and state statutes,

---

[55] 391 U.S. 430 (1968).

[56] 106 S.Ct. 1842 (1986).

brought suit in federal court. The district court ruled in the board's favor, dismissing all the claims of the disgruntled teachers. With respect to the Equal Protection Clause claim, the district court approved the racial preference as an attempt to remedy societal discrimination by providing role models for minority schoolchildren. The court of appeals affirmed.

The Supreme Court, reversing the lower courts, decreed that societal discrimination alone cannot justify any racial classification adopted by a public employer. The Court also shunned the role model theory as an adequate justification for the affirmative action plan limiting the layoff of minority teachers. The Court said "the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices,"[65] and in fact, if taken to the extreme could be used to justify limiting the number of black teachers employed by the school. However, Justice O'Connor, in a concurring opinion, did indicate that promoting racial diversity might be an appropriate objective.

The Court acknowledged that "race-conscious remedial action may be necessary"[66] to eliminate racial discrimination from the schools, but it admonished school boards contemplating a voluntary affirmative action program to ensure that "it has convincing evidence that remedial action is warranted," i.e., "sufficient evidence to justify the conclusion that there has been prior discrimination."[67] The Court pointed to the fact in this case that the lower courts that reviewed the validity of the layoff provision had concluded that statistical disparities in the number of minorities employed by the school board in the past resulted from general societal discrimination, not from the board's own discriminatory practices.

Justice O'Connor, in a concurring opinion, clarified that the Court did not mean that a public employer must await a judicial finding of discrimination before establishing an affirmative action program. Justice O'Connor extolled the value of voluntary compliance by a public employer in elimination of racial discrimination, but she too instructed that the employer "must have a firm basis for determining that affirmative action is necessary."[68] O'Connor stated that in this case, she would not invalidate the layoff provision simply because no particularized finding of discrimination had been made but because the provision was not "narrowly tailored" to achieve its asserted remedial purpose. She said the layoff scheme was keyed to a hiring goal, achieving the same percentage of minority faculty as minority student enrollment, that has no relationship to the remedying of employment discrimination.

O'Connor's conclusion that the layoff provision was not "narrowly tailored" to the asserted remedial purpose echoed the Court's findings, but her reasoning was much less extreme than that of Justice Powell who announced the judgment of the Court. While Powell acknowledged that "innocent persons may be called upon to bear some of the burden" necessary to remedy the effects of prior discrimination, he suggested that the burden should be diffused among society generally through hiring goals. He called layoffs "too intrusive" because particular individuals must bear "the entire burden of achieving racial equality" which often

---

[65] *Id.* at 1847–48.

[66] *Id.* at 1848.

[67] *Id.*

[68] *Id.* at 1856 (O'Connor, J., concurring).

results in "serious disruption of their lives."[69] While not directly foreclosing all possibility that *any* layoff plan could satisfy the "narrowly tailored" test, Powell said the plan at issue in this case violated the Equal Protection Clause because less intrusive means, such as hiring goals, existed to accomplish purposes that may otherwise be legitimate.

Justice Marshall, in a vigorous dissent, characterized the question posed by this case as follows: "whether the Constitution prohibits a union and a local school board from developing a collective bargaining agreement that apportions layoffs between two racially determined groups as a means of preserving the effects of an affirmative hiring policy, the constitutionality of which is unchallenged."[70] Marshall answered decidedly not. Marshall said that if the Court had "genuinely consider[ed] the circumstances of the provision at issue" in this case, the provision would have passed constitutional muster. Marshall asserted that in fact adequate evidentiary support did exist for the remedial action taken. Although the lower courts did not consider this evidence, Marshall felt that Powell should have remanded the case for such factfinding.

In assessing the means chosen to achieve the state purpose, Marshall called Powell's position "untenable" since "[a]s a matter of logic as well as fact a hiring policy achieves no purpose at all if it is eviscerated by layoffs."[71] Furthermore, Marshall viewed the layoff plan as a "narrow provision" because "it allocates the impact of an unavoidable burden proportionately between two racial groups." He challenged the rest of the Court to propose an alternative that would achieve the stated goal in "any narrower or more equitable fashion."[72]

The *Wygant* decision no doubt will cause school boards to be leery of establishing voluntary affirmative action plans unless the discriminatory practices of the school board have been previously established or there exists substantial evidence to support such a finding. One lesson that school boards should take from the *Wygant* case is to ensure that whatever evidence they have to support a particular race conscious remedial plan is properly presented to the trial court should the plan ever be challenged. The *Wygant* decision will also certainly encourage school boards contemplating a change in a strict seniority layoff scheme to think twice before doing so. Although Justice Powell strongly objected to the use of race-conscious layoff plans as a means of remedying prior employment discrimination, Justice O'Connor indicated that such plans might be able to satisfy constitutional standards if they are linked to hiring goals that seek to increase the percentage of minority employees to the same percentage of minorities in the relevant labor pool. Justice Marshall's strong dissent added support to this view when he argued that minority hiring goals can become meaningless if layoffs proceed on a strict seniority basis. One thing is clear, the Supreme Court did not make it easier for school boards to understand the parameters of permissible affirmative action.

The other two affirmative action cases involved the scope of remedies that a court may order under Title VII of the 1964 Civil Rights Act. In the first case, *Local No. 93 v. City of Cleveland*,[73] the Supreme Court affirmed 6–3 the lower

---

[69] *Id.* at 1851–52.

[70] *Id.* at 1860 (Marshall, J., dissenting).

[71] *Id.* at 1864.

[72] *Id.* at 1865.

[73] 54 L.W. 5005 (U.S. July 2, 1986).

court's approval of a consent decree (entered without the intervenor-union's consent) which provides for the use of race-conscious relief in promoting firefighters. In a narrow holding, the Court said the remedial authority of a court under § 706(g) of Title VII which precludes imposing certain forms of race conscious relief is *not* applicable to voluntary agreements that may benefit persons who are not actual victims of discrimination. The Court so held while recognizing that "a court might be barred from ordering the same relief after trial or, as in *Firefighters v. Stotts*,[5] in disputed proceedings to modify a decree entered upon consent." The Court acknowledged that "the consent decree does not purport to resolve any claims that it violates the general anti-discrimination provision of Title VII or the fourteenth amendment," claims it left for the district court to resolve.

In its other decision, *Local No. 28 v. EEOC*,[6] the Court again upheld race-conscious affirmative action under certain circumstances. Six Justices, including one dissenter, held that courts may in some cases grant preferential relief to persons who are not actual victims of unlawful discrimination. In this case, the Court upheld a court-ordered affirmative action plan which consisted of a 29.23% non-white membership goal and a fund to increase the pool of qualified non-white applicants for the apprenticeship program through training, counseling and tutorials. The Court also approved the district court's use of statistical data based on the relevant labor pool for establishing the 29.23% goal, contempt fines and the fund as remedies for civil contempt and an administrator to supervise the union's membership operations. The dissenters characterized the membership goal as a "rigid racial quota," unreachable by good faith efforts of the union and found it to be a violation of Title VII.

These three cases do not make it easy to discern the Court's "position" on affirmative action. Perhaps the least confusing way to view the cases is to focus on their differences. First, the Court decided the *Wygant* case under the Equal Protection Clause, whereas the other two cases involved issues limited to Title VII. Secondly, the affirmative action provision in *Wygant* took effect at the time of staff reduction while the other two cases concerned remedial programs aimed at union membership and promotional decisions. While the Court seemed to approve remedial relief that may accord benefits to persons who have not been the actual victims of race discrimination, it will not impose the cost of granting such benefits on particular individuals who did not engage in discriminatory practices. Finally, the Court's approval of the remedial action ordered in *Local No. 28* and the voluntary compliance in *Local No. 93* can be easily understood in view of the fact that the past history of racial discrimination of the defendant in each case had already been well established; this was not the case in *Wygant*.

SEPARATION OF POWERS

In *Bowsher v. Synar*,[7] the Supreme Court decided on separation of powers principles the constitutionality of certain parts of the Balanced Budget and Emergency Deficit Control Act of 1985 (commonly known as the Gramm-Rudman-Hollings Act).

---

[5] 467 U.S. 561 (1984).

[6] 54 L.W. 4984 (U.S. July 2, 1986).

[7] 54 L.W. 5064 (U.S. July 7, 1986).

The Act, designed to eliminate the federal deficit by 1991, sets a target "maximum deficit amount" for each year beginning in 1986. If the target is not met through the traditional budget and appropriation process, the Act provides for a so-called "sequestration" process. Under that process the Directors of the Office of Management and Budget (OMB) and the Government Accounting Office (GAO) each calculates first, the amount by which the deficit exceeds the target and second, the budget reductions necessary to meet the target.

Their reports are then submitted to the Comptroller General who issues his own report. That report forms the basis for a Presidential "sequestration order," which makes the budget cuts. The first sequestration order, for fiscal year 1986, was issued by the President on February 1. It resulted in a cut in education funding of 4.3%.

Shortly after passage of the Act on December 12, 1985, two suits were filed in the U.S. District Court for the District of Columbia. The suits were consolidated and heard by a three-judge panel in January. One suit, brought by members of the Congress, challenged the provision requiring the President to "sequester" funds. Plaintiffs argued that such power is legislative and cannot be delegated to the Executive Branch. The other suit by members of the National Treasury Employees Union also disputed the sequestration process, in particular the order which reduces their cost-of-living increases. The suits also challenged, as an unconstitutional delegation of executive power, the conferring of powers to the Comptroller General. The Department of Justice joined the challenge as to the Comptroller General, but supported the constitutionality of the remainder of the Act.

In a unanimous decision, a three-judge panel of the court ruled against the plaintiffs on the question of the authority of the President to sequester funds. Disagreeing that Congress had "declined to make the hard choices," the court opined that Congress "has established an intricate administrative mechanism to address [the] goal [of deficit reduction by 1991] and it has specified in meticulous detail which program budgets will be reduced in order to achieve that result, and by how much."

The court declared the President's February sequestration order unconstitutional because it was based on the Comptroller General report. The powers conferred to the Comptroller General are executive powers, which cannot be exercised by an officer removable by Congress. The court noted that Congress had included in the Act a "fallback" clause, to be operative in the event of a finding of unconstitutionality. Under that provision the OMB-GAO Report would be transmitted to a special committee of Congress, instead of to the Comptroller General, ultimately to be passed by both houses and presented to the President for signature or veto. That process, in the opinion of the panel, passes constitutional muster.

On appeal the Supreme Court affirmed the district court decision that the powers accorded the Comptroller General violate the constitutional separation of powers principle that Congress take no direct role in the execution of the laws. The Court reached this conclusion based on its belief that the Comptroller General is an officer of the Legislative Branch and therefore cannot be entrusted with any executive powers. The key factor that the Court used to support its reasoning lies in the removal powers that Congress kept to itself in the statute defining the Comptroller General's office. The Comptroller can only be removed from office by impeachment or by a joint resolution of Congress. He may be removed for "inefficiency," "neglect of duty," or "malfeasance," terms the Court

considered broad enough to allow removal "for any number of actual or perceived transgressions of the legislative will."[77] The Court also pointed to the fact that Congress referred to the Comptroller General as an officer of the Legislative Branch in subsequent legislation and that past Comptrollers had described themselves as members of the Legislative Branch in their public statements.

The Court had no trouble in determining that the powers vested in the Comptroller under the Act are executive. The Court said that the power to exercise independent judgment and evaluation with respect to the estimates and reductions submitted to him by the GAO and the OMB "plainly entail execution of the law in constitutional terms." This function called upon the Comptroller to "interpret the provisions of the Act to determine precisely what budgetary calculations are required," a function the Court considered the "very essence of 'execution' of the law." The provisions also gave the Comptroller "ultimate authority to determine the budget cuts to be made" and in fact to "command" the President to implement the Comptroller's budget reduction directive without variance.[78] The Court said that by placing such responsibilities in the hands of the Comptroller, the Congress had in effect "retained control over the Act and . . . intruded into the executive function."[79]

The Court chose to strike down the provision rather than to recast the Comptroller as an executive officer by eliminating the congressional power to remove him. The Court felt comfortable in doing so on the basis of the "fallback" provisions which take effect upon invalidation of any of the Act's reporting procedures.[80]

Justice White in his dissenting opinion disputed the majority's conclusion that the Comptroller is subject to the congressional will.

MISCELLANEOUS

State School Lands Appropriations

In *Papasan v. Allain*,[81] the Supreme Court affirmed the court of appeals determination that the county school boards, superintendents and children would not be barred by the Eleventh Amendment from asserting an Equal Protection claim based upon the present disparities in the distribution of benefits from the state's school lands appropriations. While upholding the court of appeals' use of the *San Antonio v. Rodriguez*,[82] "rational relationship to a legitimate state purpose" standard of review to Equal Protection challenges to public school funding disparities, the Court rejected the use of *Rodriguez* as a means of "validating all disparities that might occur in a system similar to that approved" in *Rodriguez*. The question of whether the appropriation disparities present in this case bear a rational relationship to a legitimate state purpose was remanded. On a separate issue the Court held that the Eleventh Amendment did bar the petitioners' claim

---

[77] *Id.* at 5068.

[78] *Id.* at 5069.

[79] *Id.* at 5069–70.

[80] Congress has already acted under these "fallback" provisions to restore some of the budget cuts that became invalid under the *Bowsher* ruling.

[81] 54 LW 4939 (U.S. July 1, 1986).

[82] 411 U.S. 1.

against state officials for maladministration of a federal school lands trust because any relief for such a claim would "in practical effect [be] indistinguishable in many aspects from an award of damages against the State."[83]

State Withdrawal from Social Security System

In *Bowen v. Public Agencies Opposed to Social Security Entrapment*,[84] the High Court found that the contractual arrangement to withdraw from the Social Security System entered into by the states, their public agencies and the federal government are not property within the meaning of the Fifth Amendment. Because Congress expressly reserved the authority to amend the provisions permitting such agreements, termination of the states' ability to withdraw is within Congress' reserved power. The Social Security contractual arrangement is subject to such termination without constituting a taking of property within the meaning of the Fifth Amendment.

Preclusive Effect of Administrative Agency Decisions

In *University of Tennessee v. Elliott*,[85] the Supreme Court affirmed the Sixth Circuit's holding that unreviewed state administrative agency decisions do not have a preclusive effect upon subsequent Title VII claims brought in federal court. However, the Court reversed the court of appeals' holding that state administrative proceedings never have a preclusive effect in subsequent actions brought in federal court under 42 U.S.C. § 1983. When a state administrative agency acting in a judicial capacity resolves disputed issues of fact which the parties have had an adequate opportunity to litigate, the Court held traditional rules of preclusion apply to subsequent § 1983 actions for reasons of federalism and judicial efficiency.

---

[83] 54 L.W. at 4944, *citing* Edelman v. Jordan, 415 U.S. 651, 668.

[84] 54 L.W. 4699 (U.S. June 19, 1986).

[85] 54 L.W. 5084 (U.S. July 7, 1986).

INDEX

A

Affirmative Action—*v2*: 119–122

Antitrust—See Sherman Antitrust Act

Attorney's Fees—See also topic under EAHCA

42 U.S.C. §1988, *v2*: 115–117

C

Child Abuse

By school employees, *v2*: 58–62

Investigation by outside agencies, *v2*:57–58

Reporting, *v2*:55–57

Civil Rights

Liability, *v1*: 111–112, 150–151; *v2*: 111–115

Section 1983, *v1*: 122–123, 151–154; *v2*: 111–115

Comparable Worth, *v1*: 47–72

D

Damages—See topic under Tort

Constitutional violations, *v2*: 111–113

Defamation—See topic under Termination

Discrimination—See also Rehabilitation Act, Title VII

Defenses

Employment *v1*: 23–30

Due Process, Employees

Procedural, *v1*: 7–8, 88–113, 157–158

E

Education Consolidation and Improvement Act of 1981—See Title I—Elementary and Secondary Education Act

Education for All Handicapped Children Act

Attorney's fees, *v1*: 41

Court appeals, *v2*: 98–103

Discipline *v1*: 44–45; *v2*: 95–96

Due process *v1*: 31–45; *v2*: 96–98

Exhaustion of administrative remedies, *v1*: 43–44

Infectious disease (as a handicap) *v2*: 103

Placement *v1*: 40–41; *v2*: 89–95

Related Services, *v1*: 41

Tuition reimbursement *v1*: 41–43, 144–145

Eleventh Amendment—See Immunity

Employees—See also Title VII, Due Process, Discrimination, Free

Speech, Termination
Due process rights, *v1*: 7–8, 88–113, 157–158
Protected interests, *v1*: 14–22, 89–104
Termination, *v1*: 14–22, 88–113, 157–158
Equal Access Act—See topic under Religion
Equal Pay Act, *v1*: 47–49

F
Fair Labor Standards Act, *v1*: 147–149
Effective dates & coverage (Amendments), *v2*: 43–44
Exemptions, *v2*: 44–48
Minimum wage compliance, *v2*: 49
Overtime compliance, *v2*: 49–54
Record keeping requirements, *v2*: 54
Volunteer exclusion, *v2*: 48–49
Federal Funds
Balanced Budget Act of 1985, *v2*: 122–144
Funding to local school districts, *v1*: 149–150
Payment in Lieu of Taxes, *v1*: 149–150
Federalism
Delegation of powers, *v1*: 147–148
First Amendment—See also Free Speech and Religion
Marital status, *v2*: 19
Political affiliations, *v2*: 12–16, 105–107
Right of association, *v2*: 19
Sexual preference, *v2*: 16–18
Fourteenth Amendment—See also Due Process
Liberty/Property interests, *v1*: 14–22, 88–104
Fourth Amendment—See Search and Seizure
Free Speech Rights
Employee criticism of employer, *v2*: 6–11
Political Affiliations, *v2*: 12–16, 105–107
Public Employees, *v2*: 5
Students, *v2*: 107–110
Symbolic speech, *v2*: 11–12

H
Handicapped—See Education for All Handicapped Children Act, Rehabilitation Act

I
Immunity—See also topic under Civil Rights and Tort
Sovereign—*v2*: 124–125

L
Liability—See also topic under Civil Rights and Tort

N
Negligence—See topic under Tort

R
Race Discrimination—See Affirmative Action and Title VII
Rehabilitation Act, *v1*: 145–147
Religion
Accommodations of employee religious beliefs, *v2*: 37–39
Aid to parochial schools, *v2*: 27–31, 110–111
Creationism, *v2*: 39
Equal Access Act, *v1*: 79–80, 87; *v2*: 31–35
Home schooling & compulsory attendance, *v2*: 35–37
Invocations & benedictions, *v2*: 40–42
Meditation, *v2*: 23–27
Offensive curriculum materials, *v2*: 39–40
Silent prayer, *v1*: 80–82; *v2*: 23–27
Student religious groups, *v1*: 73–79; *v2*: 107–109

S
Search and Seizure
Automobiles on school premises *v2*: 74
Canine sniff, *v1*: 144; *v2*: 76–79
Exclusionary rule, *v1*: 141; *v2*: 65–69
Generally, *v1*: 140–144
Locker searches, *v2*: 71–74
Metal detectors, *v2*: 79–80
Personal search, *v2*: 74–76
Police involvement, *v2*: 82–84
Property searches on school premises, *v2*: 69–74
Reasonable suspicion, *v2*: 64–65
Strip searches, *v2*: 80–82
Surveillance, *v2*: 70–71
T.L.O. decision, *v2*: 63–64
Urinalysis, *v2*: 79–80
Section 504—See Rehabilitation Act
Section 1983—See Civil Rights
Section 1988—See topic under Attorney's Fees
Separation of Powers—*v2*: 122–124
Sex Discrimination—See topic under Title VII
Sherman Antitrust Act
State anticompetitive activities, *v1*: 150–151
State Funds—*v2*: 124–125

T
Teacher Rights—See Employees
Tenth Amendment—See Federalism
Termination
Due process, *v1*: 20, 88–113, 157–158
Federal Rules of Evidence, *v1*: 1
Hearing, *v1*: 20, 104–109
Notice, *v1*: 20, 105–106
Pre-termination rights, *v1*: 105, 157–158
Use of expert and lay opinion witnesses, *v1*: 1–13
Title I—Elementary and Secondary Education Act of 1965

Federal grants for supplementary programs, *v1*: 159–160
Retroactivity of standards and statutory amendments, *v1*: 161–162
Title VII—See also Civil Rights & Affirmative Action
Administrative Agency Decisions—*v2*: 125
Race discrimination, *v2*: 118–122
Right to jury trial, *v1*: 25, 27–28
Sex discrimination, *v1*: 49–51; *v2*: 117–118
Statute of limitations, *v1*: 24–25
Tort
Damage claims, *v1*: 114–130
Defenses to damage claims, *v1*: 128–136
Immunity, *v1*: 130
Liability, *v1*: 123–124
Negligence, *v1*: 114–128; *v2*: 114–115
Respondeat superior, *v1*: 123, 125–126
Supervision/Instruction, *v1*: 124–127, 131–136

V
Voting Rights Act
Changes in election procedures, *v1*: 154–156

NSBA Council of School Attorneys

Chairman
George T. Rogister, Jr.

First Vice-Chairman
William Fearen

Second Vice-Chairman
David M. Pedersen

Secretary/Treasurer
Patricia Baker

DIRECTORS

Terms Expire 1987

John S. Aldridge
Jean Bilger Arnold
Spencer E. Covert, Jr.
Norman H. Gross
John F. Kennedy
Frederick L. Rice
Donald B. Sweeney, Jr.

Terms Expire 1988

Joseph E. Flynn
James C. Hanks
Faye Hartog-Rapp
Michael Hoge
B. Edwin Johnson
Bradley F. Kidder
John G. Moyer, Jr.
Michael J. Spector

Ex Officio

Nellie C. Weil, NSBA President
Gerald A. Caplan
E. Freeman Leverett
R. Dean Jollay, Jr.
Thomas A. Shannon, NSBA Executive Director